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NO. 80-1989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF SOUTH DAKOTA
Petitioner,

v.

NEIL GOLDSCHMIDT, UNITED STATES SECRETARY OF TRANSPORTATION;
WILLIAM M. COX, FEDERAL HIGHWAY ADMINISTRATOR;
ARTHUR JOHNSON, DIVISION HIGHWAY ADMINISTRATOR;
AND THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS, AND THE U.S. DISTRICT COURT, DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION

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QUESTION PRESENTED

Whether 23 USC 131:

(1) Violates the propriety requirement of the necessary and proper clause by the use of economic coercion, or a penalty as an *improper means* of inducing state agreements, and is but an indirect method of vitiating the limitation of the Tenth Amendment *(National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976) prohibiting Congress from directly displacing traditionally reserved state powers i.e., zoning and land use regulation;

(2) Violates the necessity requirement of the necessary and proper clause by giving the states the *option* of complying, or of not complying with a stated national policy, and of thus subverting any assumed constitutional *necessity* or justification for the exercise of a national power;

(3) Is beyond the power of Congress as an attempt to regulate the state's governance of commerce, as opposed to commerce itself; and

(4) Violates all notions of comity underlying constitutional federal-state relations through the use of economic coercion, or penalties to induce state action.

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IN THE

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OCTOBER TERM, 1981

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NEIL GOLDSCHMIDT, UNITED STATES SECRETARY OF TRANSPORTATION;
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PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT COURT OF APPEALS,
AND THE U.S. DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA,
CENTRAL DIVISION

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of South Dakota, Petitioner herein, prays that a writ of certiorari issue to review the opinions and judgments of the United States District Court, District of South Dakota, Central Division, entered in the above-entitled case on April 7, 1980, and of the Eighth Circuit Court of Appeals rendered on Appeal herein and entered on December 12, 1980, and the Petition for Rehearing and suggestions for rehearing en banc denied by such Appellate Court on January 2, 1981.

OPINIONS BELOW

The opinions of the United States District Court are unreported and were rendered on April 7, 1980. That court's opinions and judgments are printed herein as Appendices A-D, infra.

The opinion of the Eighth Circuit Court of Appeals is unreported and with the judgment is printed herein as Appendices E-F, infra, and were filed December 12, 1980. The judgment was filed below on January 23, 1981.

The order of the Eighth Circuit Court of Appeals denying the petition for rehearing and suggestions for rehearing en banc was rendered January 2, 1981, and is also printed herein in Appendix G, infra.

JURISDICTION

The opinion and judgment of the Eighth Circuit Court of Appeals was entered on the 12th day of December, 1980. (Appendices E-F)

A timely petition with suggestions of hearing en banc was denied by the Eighth Circuit Court of Ap-

peals on the 2nd day of January, 1981. (Appendix E) Its judgment was filed in the District Court on January 23, 1981.

The jurisdiction of the United States Supreme Court is invoked under 23 USC 131(1), expressly providing for review by this Court of disputes under this Act between a state and the United States Government upon certiorari pursuant to 28 USC 1254. (Appendix H)

Where the state has a legitimate right to receive federal highway trust funds by virtue of statute, 23 USC 104, violation of such right creates a justiciable claim even without specific statutory authorization for judicial review. *State of Oklahoma v. U.S. Civil Service Commission* 67 S.Ct. 544 at 550, 330 U.S. 127 (1947).

STATUTES INVOLVED

The Statutes involved in this matter are 23 USC 131, as amended, and H.B. 786, 1977 South Dakota Legislature, codified as SDCL 31-29, both printed herein as Appendices H and I, infra.

The Constitutional provisions involved herein are Article I, Section 8 and the Tenth Amendment of the United States Constitution and are also printed herein as Appendix J, infra.

STATEMENT OF CASE

This Petition concerns the potential *reapportionment* by the United States Secretary of Transportation to other states of in excess of $4 million of South Dakota's Fiscal Year 1978 Federal Highway Trust Fund apportionment otherwise legally belonging to Petitioner as provided by 23 USC 104. The U.S. Secretary of Transportation made an administrative inter-

pretation that South Dakota had not complied with the Federal Highway Beautification program, 23 USC 131, and rules promulgated thereunder, and *penalized* the state by reducing its federal highway funds ten percent. (Appendix K)

The state requested an administrative hearing pursuant to 23 USC 131. The hearing examiner found the state had made a "good faith" effort to comply with the federal law. The Secretary ignored the hearing examiner's findings and conclusions and ordered that the *penalty* be made permanent.

The state as provided by 23 USC 131(1) made a timely appeal of such administrative decision to the United States District Court, District of South Dakota, Central Division. South Dakota raised numerous Constitutional issues in both the administrative proceeding and appeal to the Federal District Court (No. 78-3051) and, additionally, had initiated a separate Constitutional test case (No. 77-3039) attacking the constitutionality of 23 USC 131. The cases were consolidated and the Federal District Court rendered opinions and judgments adverse to the state in both cases. (Appendices A-D)

Appeals as specifically authorized by 23 USC 131(1) were taken from both adverse decisions and judgments to the United States Court of Appeals for the Eighth Circuit where, again, consolidation was ordered. The United States Court of Appeals for the Eighth Circuit affirmed the trial court on December 12, 1980, and denied the state's petition for rehearing and suggestions for rehearing en banc on January 2, 1981. (Appendices E-G)

Jurisdiction is provided by 23 USC 131(1) for review of such decisions upon certiorari as provided in 28 USC

1254, and under the principle of *Oklahoma v. U.S. Civil Service Commission*, supra. 23 USC 131 provides that the penalty withheld by the secretary shall *not* be reapportioned to the other states as long as suit is pending.

The *penalty* which the secretary in his discretion may impose upon the states under 23 USC 131 is ten percent of the state's *annual* apportionment otherwise due the state pursuant to 23 USC 104. But for the penalty the state would automatically receive its full apportionment pursuant to the statutory formula enacted by Congress.

The *penalty* as is clear from the face of the statute has nothing whatsoever to do with the actual use of the Federal Highway Trust Funds for the *construction* of the Federal-Aid Highway Systems. Thus, it is also clear from the face of the statute that the *penalty* is not in any way a *conditioning* of the actual use of the funds for the purpose intended, but rather a *sanction* for the states not agreeing to undertake an unrelated object, i.e., state zoning and land use control.

Another material fact is that the U.S. Secretary of Transportation has actually promulgated a wealth of administrative rules codified in 23 CFR *Highways*, Part 750, *Highway Beautification*, setting forth every minute detail of the state's zoning and land use regulation and enforcement requirements. (Appendix L)

The record establishes that the penalty and threats of sanction are in fact weapons of coercion.

The requirements imposed upon the states by 23 USC 131, under threat of loss of ten percent of their entire *annual* Trust Fund apportionment, are to enact laws and provide all funds and resources for the en-

forcement of the Federal scheme for regulating outdoor advertising in the corridor *zone* adjacent to thousands of miles of selected federal-aid highways.

The South Dakota highway map (appearing as a trial exhibit) discloses that the federal statute mandates a *strip zone* wherein the state must exercise its jurisdiction of enforcement of the federal regulatory scheme for several thousands of miles adjacent to all Interstate and primary federal-aid highways across the width and breadth of the state.

This strip zoned corridor covers all *private* property *within* sight of and adjacent to the covered federal-aid systems. Although other federal-aid highway systems are not covered by the requirements of 23 USC 131, the penalty, nevertheless, is imposed upon all federal-aid highway system apportionments.

The so-called "effective control" of outdoor advertising which must be imposed by the state within this zoned corridor adjacent to the rights-of-way of the covered systems means that the state to comply in the eyes of the secretary must:

(1) Exercise its sovereign police power to prohibit the erection and maintenance of covered outdoor advertising within sight of the covered systems to the full extent of this zoned corridor across the width and breadth of the state;

(2) Exercise its sovereign powers of eminent domain to cause the removal of existing non-conforming outdoor advertising;

(3) Pay from state funds for twenty-five percent of all "just compensation" due from such taking or damaging of property rights;

(4) Pay for all legal expenses and costs associated

with such condemnation and other legal proceedings and negotiations;

(5) Utilize the state court system for all such required legal proceedings; and

(6) Establish an *acceptable* surveillance program which in the opinion of the secretary is "effective" utilizing state money, personnel, and resources for total enforcement of the federally devised scheme pursuant to the federal rules and regulations.

All of the foregoing state action as clear from the record is subject to continuous monitoring and approval by various federal Department of Transportation officials to conform to the myriad of federal rules, internal Department of Transportation policy memorandums and directives, and broad, unwritten administrative discretion.

The material facts disclose that the state, in effect, had no choice at all and that it suffered economic reprisals whether it complied or did not comply with the mandates of 23 USC 131.

The material facts disclose that the state faced irreparable damage and economic injury no matter what it chose to do.

The material facts in this regard were undisputed in the record.

Consider:

Tourism is South Dakota's second largest industry. Tourism obviously caters to the traveling public, mostly strangers to the environs, and studies conducted by Congress, itself, disclose that outdoor advertising is the only *effective* means of communicating between this industry and its constituents.

South Dakota, then, faced a dilemma. The record demonstrates that compliance would severely injure the state's second largest industry and its own finances through tax revenue losses.

The state through the University of South Dakota had undertaken substantial economic studies to determine the effect of compliance and non-compliance. The economic findings and conclusions were placed into the record by the economist who had been responsible for these studies.

The studies showed:

(1) Over forty percent of South Dakota tourists would not have stopped at the businesses where they were interviewed without outdoor advertising;

(2) Thirty-seven percent of the travelers in South Dakota would not have stopped in the absence of non-conforming outdoor advertising;

(3) Almost fifty percent of those travelers stopping in the lesser populated counties would not have done so in the absence of non-conforming outdoor advertising;

(4) In the absence of non-conforming outdoor advertising over sixteen percent of the tourism business would have been lost to the state;

(5) This loss of business would have cost the state as much as $81.5 million in lost income which is approximately two percent of the gross income of the state;

(6) The loss of income would have been twice as great in the smaller more rural counties as in the more populated ones thus creating some special

economic problems through business closings, unemployment, etc.;

(7) The decrease in state sales tax revenue due to the removal of outdoor advertising could equal as much as $2.1 million per year, with local governments losing substantial amounts of real property taxes through the closing of businesses;

(8) The loss of employment in the state could total as many as two thousand eight hundred (2,800) jobs with the impact being most severe on part-time and seasonal employees, particularly students; and

(9) The loss of tourism business in the state would lead to a reduction in gasoline tax revenues thus actually reducing the ability of the Highway Department through its dedicated highway revenue fund to match and obtain Federal Funds which, in turn, would create a negative impact on the construction and maintenance of the federal-aid highway program itself.

Non-compliance, on the other hand, resulted in equally serious fiscal and economic problems due to the loss of ten percent across the board of all federal highway-aid system apportionments.

The testimony and exhibits of the state highway officials disclose (1) that there was without the imposition of the sanction an existing highway finance crisis in South Dakota at the time of the hearing and (2) the imposition of the sanction would exacerbate an already critical fiscal situation. The state's testimony stands unrefuted.

Consider:

The state transportation secretary testified that due

to the existing crisis, and not considering the ten percent sanction, the state had had to lay off a number of highway employees and cut back seriously on maintenance due to a lack of highway funding.

Maintenance, which is a 100 percent state financial responsibility since there are no federal-aid funds available for maintenance of the federal-aid systems, was without the penalty falling behind 140 miles per year. The state was already 666 miles in arrears in its maintenance program. The dramatic impact of inflation and increased costs for petroleum products used so heavily in highway maintenance were also steeply increasing due to the energy crisis.

The state as disclosed from the material facts could not win. 23 USC 131 presented the state with no choice at all. Any alleged choice is illusory.

The hearing examiner had found that the state had acted in good faith in attempting to comply.

The trial judge found and held that the state would *not* have exercised its sovereign zoning powers without the penalty of 23 USC 131.

The Eighth Circuit, like the trial judge, repeatedly states that the provisions of 23 USC 131 constitute a "*penalty*".

The result of 23 USC 131 either on its face or as applied to the state of South Dakota is penal or constitutes economic coercion.

REASONS FOR GRANTING WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE PRESENCE OF IMPOR-

TANT AND DIFFICULT QUESTIONS OF FEDERAL-STATE RELATIONS

This Court has clearly established that the presence of important and difficult questions of Federal-State relations is grounds for granting certiorari. *Cleary v. Bolger* 83 S.Ct. 385, 371 US 392 (1963). *Leiter Minerals, Inc. v. United States* 77 S.Ct. 287, 352 US 220 (1957) reh. den. 77 S.Ct. 553, 352 US 1019.

A. 23 USC 131 violates the propriety requirement of the necessary and proper clause, and further violates all notions of comity underlying federal-state relations.

The highway beautification act, 23, USC 131, *mandates* a state zoned corridor beyond and within sight of certain federal-aid highways, and state regulation of all outdoor advertising within such zone, subject to a *penalty* of 10% of each annual highway fund *entitlement* for a state's failure to create the control zone and regulate the private land use therein in accord with the federal regulatory scheme. South Dakota exercised its police power and created the zone but was determined by the Secretary to have deviated from the Federal regulatory scheme. The district court held the State would *not* have exercised its sovereign zoning powers *but* for the penalty. The appellate court acknowledges 23 USC 131 to be *penal*, but affirmed.

It is constitutionally impermissible for Congress to use a *penalty* to induce state action. *Oklahoma v. Civil Service Commission* 67 S.Ct. 544, 330 U.S. 127 (1947).

It is constitutionally improper for the Congress to use economic coercion to induce an agreement to participate in a federal regulatory scheme. *United States v. Butler* 56 S.Ct. 312, 297 U.S. 1 (1936).

Thus, 23 USC 131 which admittedly imposes a penal-

ty, and which is economically coercive under the undisputed facts, is a constitutionally improper exercise of Congress' power by the limitation of the necessary and proper clause of Article 1, Section 8. It is repugnant to the concepts of *comity* upon which federal-state relations are founded. *Younger v. Harris* 91 S.Ct. 746, 401 US 37 (1971).

Both the tax and spend powers and the necessary and proper clause are part of Article I, Section 8 of the United States Constitution.

All express congressional powers, including that of tax and spend, depend upon the interpretation and application of the necessary and proper clause for their effective implementation.

Even though the exercise of a power itself may be for a proper end or objective, the "means" of carrying the power into law must be both necessary and proper. This has long been a litmus test of contitutionality and is a matter of judicial review and determination. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

23 USC 131 requires that the state enact *acceptable* statutes and enter into *acceptable* agreements. Whether in fact the state statutes and agreements are *acceptable* is a matter of discretion for the United States Secretary of Transportation.

Thus, 23 USC 131 purports to govern intergovernmental relations via *contract*. In order to induce the states to enter into the contracts to enforce the outdoor advertising program envisioned by the federal statutes and rules, a penalty or sanction is imposed in the amount of ten percent of all otherwise legally apportioned federal-aid highway trust funds. This constitutes economic coercion.

If the state complies with the Federal Statute, *it gets to keep what was already its own entitlement, namely all of its previously legally apportioned Federal-Aid fund.* (23 USC 104) It also however takes on the additional burdens of diverting its constitutional sovereign police and eminent domain powers, funds and personnel to implement and enforce the federal program within the corridor zone which it would not have adopted but for the penalty. The trial judge in this case so found and held. (Appendix A)

Agreements not freely reached and entered into, but which are tainted by any degree of coercion are improper. *Restatement of the Law of Contracts*, Volume II, CH. 16; *Williston on Contracts*, 3rd Ed., Vol. 13, Ch. 47; 25 Am Jur 2nd 351, *Duress and Undue Influence.*

Contracts of the United States Government are expressly subject to the law of contract including duress and undue influence. *Williston on Contract*, Id. at 728, et seq.

It is a fundamental constitutional principle that Americans have rejected dualism in the laws; that is, one legal standard for the people and a different legal standard for the government. *A Commentary on the Constitution of the United States*, Volume I, Bernard Schwartz.

Thus the rule of law applies equally to the government and the people including in areas of contract.

A fiscal penalty or economic loss is and has long been recognized as improper as a form of economic coercion. *Restatement of the Law of Contracts*, supra, Sec. 492 et seq; *Williston on Contracts*, supra, Sec. 1603, pages 663-664.

It is concluded by *Williston* in Sec. 1603 that duress flows from threats or other wrongful *withholdings* of land or other things.

The Supreme Court of the United States has long recognized the concept of economic coercion as impermissible. *Hartsville Oil Mill v. United States*, 46 S.Ct. 389, 271 US 43 (1946) *United States v. Bethlehem Steel Corp.*, 62 S.Ct. 581, 315 US 289 (1942). The Eighth Circuit Court of Appeals has also held that a person is coerced when he is made to execute a contract not based on a prior proper agreement. *Pure Oil Co. v. Tucker*, 164 F. 2nd 945 (CCA8).

Contracts of the United States government have on numerous occasions been avoided because of coercion. *Williston on Contracts*, supra, 726-736.

Is economic coercion of a state by statute to be given less judicial recognition than economic coercion of a private contractor by personnel of federal administrative agencies?

As put by Alexander Hamilton in the *Federalist* (No. 79), "A power over a man's subsistence amounts to a power over his will."

All enlightened authority hold that threats of withholding property including money as a lever to extract an agreement constitutes duress or coercion.

The fact that the coercive inducement has a federal statutory genesis and is being used as a means by Congress of coercing state action makes it even more repugnant than economic coercion used between private parties. The government supposedly by example leads the ethics and morality of society.

The use of economic coercion as an inducement to state action has never been directly judicially reviewed by the United States Supreme Court.

This is an extremely important and difficult question of Federal-State relations which deserves to be heard.

The closest this Court has ever come to this issue was *United States v. Butler*, 56 S.Ct. 312, 297 US 1 (1936). The Court in that case held upon *dual grounds* that the Agricultural Adjustment Act before it was unconstitutional. The issues in the case were primarily focused upon in light of the tax and spend powers of Article I, Section 8.

The Court held that the Congress was without the power to tax and spend to regulate intra-state agriculture. The holding in this regard became watered down when the Court subsequently held that the Congress could regulate agriculture under the commerce power.

Importantly, however, for present purposes, the Court in *Butler* had also held that the Congress could not properly resort to economic coercion by threatening to withhold the benefits of the federal program to farmers who did not enter into agreements to participate in the program. That portion of the holding of *Butler* parallels the concepts now urged by South Dakota in the present case except that in *Butler* the Court was dealing with relationships between the federal government and individuals as opposed to between the federal government and the several states.

The Supreme Court in *Butler* directly held that the use of economic coercion as a means of inducing contracts was "improper" citing *McCulloch v. Maryland*, supra.

This is the thrust of South Dakota's present argument and to this extent petitioner relies upon *Butler* as authority for the proposition that since economic coercion is improper as a *means* to induce a contract between a federal agency and an individual, economic

coercion is equally if not more *improper as a means* to induce contracts between the federal government and the several states.

The other relevant authority relied upon by petitioner for its position is *Oklahoma v. Civil Service Comm.*, 67 S.Ct. 544, 330 US 127 (1947). That case stands for the proposition that the Congress may condition its funds *so long as the condition does not constitute a penalty. (The necessary and proper clause was not before this Court in Oklahoma as a limitation upon the tax and spend power or otherwise.)*

This Court in *Oklahoma* expressly notes that it did not find the condition before it to be a *penalty* and in fact states that, *"No penalty was imposed on the state."* 67 S.Ct. at 554. That case involved the withholding of what would appear to be a few hundred dollars representing two years compensation of a part-time highway commissioner from the state's federal highway funds which at that time were in excess of two million dollars per year.

A few hundred dollars withheld out of over two million dollars certainly would not be coercive. That is factually distinguishable from the current case where South Dakota is being penalized in excess of $4 million dollars and both the Eighth Circuit Court of Appeals and the Federal District Judge recognize, concede and admit that the sanction provisions of 23 USC 131 are in fact and in law a "penalty".

It must, again, be pointed out that the necessary and proper clause was not considered by the Court in *Oklahoma.*

This Court has expressly noted that the power to condition funds by the Congress is a limited power. *United States v. Butler*, supra. The limitation is the

necessary and proper clause. This Court points out in *Butler* for example that an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the constitution is clearly bad. 296 US at 323. It is said,

> "An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power." (Ibid)

The use of a penalty or economic coercion as an instrument of inducing state action is equally obnoxious and constitutionally offensive.

The holding of *Butler* to the extent that economic coercion is constitutionally defective as an inducement to contract has never been overruled or weakened to this date.

The holding of *Oklahoma* where the Court stated that the conditioning of federal funds was valid because there was no penalty, is totally inapplicable to the situation here where both the District Court and the Court of Appeals fully acknowledge that a "penalty" is the instrument or means utilized by the statute, itself.

Federal-State interrelationships are often said to be based upon the notion of comity. Justice Hugo Black best defined this notion as one of respect by the federal government for state functions in recognition of the belief that the national government will fair best if the states and their institutions are left free to perform their separate functions in their separate ways. *Younger v. Harris*, 91 S.Ct. 746, 401 U.S. 37 at 44 (1971). See, also: *National League of Cities v. Usery*, supra. Comity or cooperation is never founded upon penalties or coercion.

B. 23 USC 131 violates the necessity requirement of the necessary and proper clause.

The federal statute purports on its face to have a nationwide purpose. 23 USC 131 (a). However, it contemplates that any or all of the states may choose *not to comply*. 23 USC 131 (b).

Thus, any state or all of the states may thwart the alleged national will of Congress and subvert a policy directed at alleviating what is perceived as a nationwide problem.

The necessary and proper clause of Article 1, Section 8 mandates that Congress in carrying out its express powers may adopt legislation which is both necessary and proper. As earlier noted what is "necessary" is a matter of judicial review. *McCulloch v. Maryland*, supra.

It is clear by *McCulloch v. Maryland*, supra, that what is either necessary or proper must be a matter of substance, not just a whim.

How can it be argued that 23 USC 131 is "necessary" if any or all of the states may by the 'simple expedient of not yielding' ignore the problem and assume the penalty? If the problem rises to one of national scope and concern may it be treated so lightly?

The federal outdoor advertising control program is as readily acknowledged merely an attempt to create and establish a national esthetic. Although desirable it cannot be argued that there is any national peril justifying or necessitating exercise of any express power of Congress.

There is no national crisis or emergency falling within the exception to the holding of *National League of Cities v. Usery*, supra.

As stated by this Court, similarity of local conditions does not give rise to a national problem. *U.S. v. Butler*, supra, at 392. If on the other hand the control of outdoor advertising is a problem national in scope, giving the states the option to ignore the problem is a constitutional farce.

There is no necessity of a constitutional stature justifying this statute.

C. 23 USC 131 regulates the states governance of commerce, not commerce itself.

Legislation such as 23 USC 131 is readily distinguishable from *direct* federal regulation of a problem (i.e., pollution or environmental despoliation) where a real and vital national problem is faced and the federal law is mandatory, direct and knows of no exceptions.

The federal government's position attempting to justify 23 USC 131 is akin to that of the EPA's "indirect polluter" thesis urged in *Brown v. Environmental Protection Agency*, 521 F.2nd 827 (9th Cir. 1975), vacated and remanded 431 U.S. 99, 97 S.Ct. 1635, (Brown I), 566 F.2nd 665 (9th Cir. 1977) (Brown II), and *District of Columbia v. Train*, 521 F.2nd 971 (D.C.C.A. 1975).

The federal government in the two *Brown* cases argued that since the states build the roads (albeit pursuant to a federal program with federal funds), and roads attract automobiles which pollute, a state which owns such roads indirectly pollutes when it fails to obey an EPA directive to adopt and enforce a federal scheme of regulation, and the state is thus subject to penalty.

Presently, the federal government argues that since the state maintains the roads, and outdoor advertising

is adjacent to the roads, the state must enforce a federal scheme for regulating private land use.

In both instances the federal government seeks to use state police powers under threat of penalty.

Both the Ninth Circuit and the District of Columbia Circuit Courts of Appeals rejected the government's argument pointing out that there is a difference between the governance of commerce by a state under its police power, and commerce itself. *Brown II* at 669, and 672.

The District of Columbia Court of Appeals notes that it is constitutionally impermissable to allow the federal government to "commandeer" the state's regulatory power. *District of Columbia v. Train*, supra, at 992.

Although the legislative history discloses that Congress did not choose to adopt the EPA "indirect source" concept after *Brown I*, the Ninth Circuit Court of Appeals on remand clearly warns that had Congress done so it would not have lightly rejected the argument that the indirect source theory collides with the holding of *National League of Cities v. Usery*, supra. *Brown II* at 672.

Congress has in fact, however, embodied the "indirect source" concept in 23 USC 131.

The record is clear that the government attempts to justify 23 USC 131 under the commerce power, and that the trial court herein so justified this federal regulatory scheme. (Appendix A)

23 USC 131 makes the state police power the conduit for the control and regulation of privately owned outdoor advertising located on private property.

23 USC 131 commandeers the state's power to regulate commerce. 23 USC 131 usurps the state's police power under threat of penalty. The state's constitutional powers, resources and money are used as a means by Congress of regulating private persons or firms who do not conform to the national esthetic.

The federal statute regulates the states power to regulate commerce, not commerce itself.

II.

CERTIORARI SHOULD BE GRANTED DUE TO THE PRESENCE OF A NOVEL QUESTION OF WHETHER THE CONGRESS MAY BY THE UNLIMITED USE OF ECONOMIC COERCION OR PENALTIES UNDER THE GUISE OF CONDITIONING ITS FUNDS INDUCE STATE ACTION

The planning and zoning of private land use has since it was originally recognized by this Court as constitutionally proper been a traditional function of the state and local governments. *Euclid v. Ambler Realty Co.*, 47 S.Ct. 114, 272 U.S. 365 (1926).

23 USC 131 requires in effect that the state exercise its sovereign police power to *strip zone a corridor within sight of certain federal-aid highways within which to regulate and control outdoor advertising.*

The trial court in this case held that South Dakota would not have exercised its sovereign zoning powers as required by 23 USC 131, *except for the penalty.* (Appendix A).

This Court has recently held that the Congress is without power due to the limitation of the Tenth Amendment to displace the states freedom to struc-

ture integral operations in areas of traditional governmental functions reserved to the states. *National League of Cities v. Usery* 96 S.Ct. 2465, 426 U.S. 833 (1976).

The Eighth Circuit Court of Appeals repeatedly in its decision affirming the Trial Court herein states that the sanction of 23 U.S.C. 131 is a *"penalty"* (Appendix E).

The record is clear that the state enacted compliance legislation (Appendix I) creating the zoned corridor for the regulation of outdoor advertising and that economic coercion had been placed upon the state by the federal act. It would not have zoned but for the penalty.

The state asserts that since the Congress may not constitutionally *directly* displace the state's freedom to structure its operations in areas of traditional governmental functions because of the prohibition of Tenth Amendment, the Congress should not *indirectly* be allowed to condition its funds in a way constituting a penalty or economic coercion as a means of inducing state action in such areas.

The trial court citing *Steward Machine Co. v. Davis*, 57 S.Ct. 883, 301 U.S. 548 (1937) intimates that the power of Congress to so condition its funds is unlimited. (Appendix A)

This is a novel question of substantial importance.

CONCLUSION

WHEREFORE, petitioners respectfully state that 23 USC 131 unconstitutionally affects substantial state's rights and prays that a writ of certiorari be granted.

STATE OF SOUTH DAKOTA
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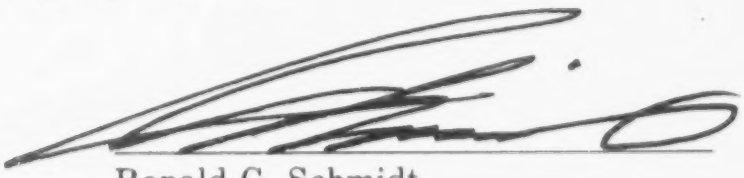
PROOF OF SERVICE

The undersigned counsel of record for petitioner, hereby certifies that on the 12th day of February, 1981, he caused forty (40) copies of the above and foregoing petition to be filed with the clerk of the U.S. Supreme Court, and further caused three (3) copies of such petition to be served upon counsel for the United States Government and all other parties to such proceedings, by causing such to be mailed to such counsel by U.S. Mail, postage prepaid, to:

Robert E. Kopp and Douglas N. Letter
Attorneys
Civil Division
Room 3631
U.S. Department of Justice
Washington, D.C. 20530



Ronald G. Schmidt
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APPENDIX A
District Court Opinion (#77-3039)

April 7, 1980

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RE: STATE OF SOUTH DAKOTA, Plaintiff
vs
BROCK ADAMS, UNITED STATES SECRETARY OF TRANSPORTATION; WILLIAM M. COX, FEDERAL HIGHWAY ADMINISTRATOR; ARTHUR JOHNSON, DIVISION HIGHWAY ADMINISTRATOR and THE UNITED STATES OF AMERICA, Defendants
CIVIL NO. 77-3039

Gentlemen and Ms. Scolnick:

MEMORANDUM OPINION

CASE SUMMARY

Plaintiff, the State of South Dakota, (State) seeks to overturn the final determination of the Secretary of Transportation (Secretary) under 23 U.S.C. § 131, (the Highway Beautification Act [Act]), that the State has not instituted effective control of billboards. The Secretary assessed a penalty of ten percent of the State's highway funds for 1978 and reserved the funds for 1979, to be returned to the State if the 1979 South Dakota Legislature complied with the Act. In accordance with the Act, §131(b), the penalty for fiscal 1978 has been withheld and reapportioned to other states but cannot be distributed to such other states unless judgment should be rendered against the State in this action, and in Civ. 78-3051.

In this action, the State contends the Act is unconstitutional because: (1) It is not within the delegated powers of Congress; (2) it invades the powers reserved to the states under U.S. Const., Amend. 10; (3) it places both adjudicatory and prosecutorial functions in the Secretary; (4) it unlawfully delegates legislative power to the states; (5) it violates the constitutional guarantee of a republican form of government; (6) it violates the Due Process Clauses of the U.S. Const., Amendt. 5 and Amendt. 14; (7) it violates freedom of expression guarantees of Amendt. 1, U.S. Const.

In Civ. 78-3051, the State asserts that the Secretary abused his discretion and made his determination on a record with no substantial evidence to support the determination. These contentions are resolved against the State in a separate opinion of this court filed in Civ. 78-3051.

In the case at bar, the court now holds that the Act is constitutional and the State's request for a declaratory judgment to the contrary is therefore denied. Summary judgment shall be entered for defendants.

FACTUAL BACKGROUND

The State of South Dakota has exhibited some reluctance to comply with the provisions of the Highway Beautification Act. In 1971, then Secretary of Transportation Volpe informed the State that its zoning of all areas around interstate and primary roads as commercial was not in compliance with the Act. The Secretary determined that the State was in violation of the Act. This determination was upheld on appeal. *South Dakota v. Volpe*, 353 F.Supp. 330 (D.S.D. 1973). The ten percent penalty was returned in 1973, after the State complied with the Act.

The State Legislature passed compliance legislation in 1973, and the South Dakota Board of Transportation entered into an agreement with the Secretary's delegate, the Federal Highway Administrator. This agreement conformed to the Act and the administrative Rules under it, and also provided that billboards erected during the period of non-compliance were to be removed entirely at the expense of the State. This agreement was invalidated, however, when the South Dakota Supreme Court, in *Hogen v. State Board of Transportation*, _____ S.D. _____, 245 N.W.2d 493 (1976) declared that the 1973 state statute constituted an impermissible delegation of legislative authority to the State Board of Transportation. There was no outdoor advertising control of any kind in South Dakota from September, 1976 to April 1, 1977.

The 1977 legislative session passed House Bill 786, and the governor signed it, in spite of the fact that the

Secretary's delegate indicated objections to the bill and warned that passage of the bill could lead to loss of ten percent of the State's highway funds for any period when such law was in effect. On July 11, 1977, the Secretary notified the State of his preliminary determination that the State had not complied with the Act and that ten percent of the State's highway funds for fiscal 1978 and succeeding years would be reserved pending final determination of whether the funds would be withheld. The notification did not contain a detailed statement of reasons for the withholding of funds. The State asked for a more particular statement and for an administrative hearing. The bill of particulars was received in September, 1977, and the hearing was held in December, 1977, before an Administrative Law Judge. The factual record was made before the Administrative Law Judge on December 12-15, 1977. The federal government was represented by the Federal Highway Adminstration. The Secretary took no part in this phase of the proceedings.

The State, on December 22, 1977, commenced two actions in this court. The first challenged the legality of the Secretary's 1977 reservation of funds, which reservation took effect on October 1, 1977. This action was decided adversely to the State in this court, and affirmed on appeal. *South Dakota v. Adams*, Dist. Ct. Civ. 77-3038, 587 F.2d 915 (8th Cir. 1978), *cert. denied*, 441 U.S. 961 (1979). The instant action, Civ. 77-3039, challenged the constitutionality of the Act and regulations under it.

The recommended decision of the Administrative Law Judge, issued in March, 1978, noted discrepancies between South Dakota and federal law, but indicated that the discrepancies could be reconciled, either through negotiation between the Secretary and the

State or through the State's application for an economic hardship exemption under 23 U.S.C. §131(o). The Administrative Law Judge found that the State had made a good faith effort to comply with the Act, and recommended that the Secretary not withhold ten percent of the State's highway funds.

The Federal Highway Administration appealed this recommended decision to the Secretary on March 24, 1978, in accordance with 5 U.S.C. §557(b), a part of the Federal Administrative Procedure Act. The State objected to this procedure as placing both the prosecutorial and adjudicative functions in the Secretary. The Secretary reviewed the record de novo, having concluded that he was not restricted by any presumption of correctness of the Administrative Law Judge's determination.

The Secretary's final Order of November 9, 1978, determines that the State's (1) directional sign regulation; and (2) regulation of signs more than 660 feet from the right-of-way, outside urban areas; and (3) its failure to enter into an adequate agreement under Section 131 (d), place South Dakota out of compliance with the Act. The Order further determines that South Dakota's fiscal 1978 funds, previously reserved, are to be reapportioned to the other states. The fiscal 1979 funds were not to be reapportioned to the other states. The State failed to enact effective billboard control by March 31, 1979. The State commenced Civ. 78-3051, seeking review of this order, on December 7, 1978.

In the time since the State brought the two actions now before the court, the legislature has passed, and the Governor has signed, legislation intended to insure compliance with the Act. 1979 S.D. Sess. L. Ch. 202, SDCL 31-29-61 through 87 (Supp. 1979). The State has, as of December, 1979, entered into an agreement with

the Federal Highway Administration and most of the fiscal 1979 funds have been released to the State. The Secretary's order of November 9, 1978, requires that the fiscal 1978 funds be permanently withheld and redistributed to the other states. The redistribution is automatically stayed pending final judgment in Civ. 77-3039 and Civ. 78-3051. 23 U.S.C. 131(1).

Both parties moved for summary judgment, and filed briefs and memoranda in support of their motions. The court first heard oral argument in this case on August 10, 1979, at which time the State sought and was granted leave to file an amended complaint. The State also requested and was granted permission to file supplemental briefs in support of contentions made and refined in the amended complaint. The Secretary duly responded to these briefs and to the amended complaint. At the request of the State, further argument was heard on October 19, 1979, and the parties have filed further briefs and affidavits since that time.

ISSUE

Is the Highway Beautification Act unconstitutional under any of the State's contentions?

DECISION

A. *Provisions of the Act Relevant to its Constitutionality.*

The Act provides that the Secretary has the power and duty to enforce its provisions. These provisions require a detailed regulatory program to be undertaken by each of the States. The program must be such as will provide "effective control" of roadside outdoor advertising. "Effective control" is defined with parti-

cularity in 23 U.S.C. 131 and the regulations adopted under it by the Federal Highway Administration. Any State refusing to adopt regulation of billboards in accordance with the federal standards is to have its federal highway funds reduced by ten percent. For purposes of the State's constitutional challenges, it is sufficient to point out that the requirements of the Act and the regulations are quite detailed, and that they *require* specific state regulation of billboards adjacent to interstate and primary highways before the State may receive one hundred percent of its federal highway funds. The requirements often conflict with the way in which the State of South Dakota would exercise its sovereign zoning powers in absence of such requirements.

23 U.S.C. 131(1) requires the Secretary to preliminarily determine whether a state is in compliance with §131. This must take place at least sixty days before a final determination is made. The State may request a hearing within the sixty-day period, and the Secretary must then issue his final determination after the hearing. The State may appeal the final determination to any district court for a district of that State. The filing of such an appeal stays the Secretary's order until final judgment in the appeal. The appeal vests the court with jurisdiction to affirm or reverse the Secretary's determination, in whole or in part, or to remand to the Secretary for further proceedings.

B. *Whether the subject matter of the Act is within the power of Congress.*

(1) Legal Background

The federal government may require that states institute certain regulatory measures or certain govern-

mental programs in order to receive full funding under federal grants. This may be accomplished under the taxing and spending clause, U.S. Const. Art. I, Sec. 8, Cl. 1 (text of this clause set forth in Footnote 4, *infra.*). *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

Conditions placed on federal grants may be used to accomplish goals of the federal government provided certain tests are met. *First*, as the tax and spend clause itself indicates, the spending must be in the "general welfare." This means that an expenditure, if it seeks to accomplish certain federal goals, must accomplish goals that benefit society at large, and not a particular group. In *United States v. Butler*, 297 U.S. 1 (1936), for example, it was held that a tax on processors of food, the proceeds of which were to benefit only farmers, violated the rule that expenditures must be for the general welfare.

Second, conditioned grants must be "fairly within national power and policy," *Steward Machine*, *supra* at 590. A conditioned grant will pass this test if it addresses a problem Congress could reasonably find to be national in scope, even if some of the aspects of the problem might have traditionally been addressed by state regulation.

Third, if the condition itself is not within national policy and power, it will not be invalidated if it is directed to the attainment of a lawful end, for which nation and state may cooperate. *Steward Machine Co. v. Davis*, *supra* at 593. The means (condition) calculated to produce a result need not, therefore, be limited to those within federal power so long as the end sought to be accomplished is within the area which the federal government may address. For example, even though the federal government has no power over state employees, it may condition funds for the salaries of such

employees on adoption by the State of regulations prohibiting partisan political activity by the State employees administering funds. This is so because the end of this condition, to ensure better public service by those administering federal funds, is an end within the powers of the federal government. *Oklahoma v. Civil Service Comm'n.* 330 U.S. 127, 143 (1947).

A condition placed on a grant will be invalidated if its effect is to coerce the State to accept the condition and to deprive the state of a choice. *Steward Machine, supra* at 589-90. In *Steward Machine* , the court did not discuss the nature of coercion necessary to invalidate a condition because it found no coercion present. In *Oklahoma v. Civil Serv. Comm'n. supra* at 143-44, however, the court held that where the State could avoid a penalty "by the simple expedient of not yield", that is, by foregoing the federal benefit to which a condition was attached, the condition was not coercive. As appears from the discussion following, it is unnecessary in this case to determine under what conditions coercion might be found. The language of *Oklahoma v. Civil Service Comm'n*, however, suggests that conditional grants might *never* be coercive.

(2) Whether the Act is within the "General Welfare"

The court concludes that the Act could reasonably be found to be in furtherance of the general welfare. The discretion vested in Congress to determine what is in the general welfare is "quite expansive." *Buckley v. Valleo*, 424 U.S. 1, 90 (1975). Congress has stated that its reasons for seeking State regulation of billboards were to protect the public interest in the highways, promote the scenic and recreational value of the highways, and promote safety on the highways. These are national goals, benefitting all of society, not just a

particular group. This is especially true in light of the fact that the construction of these highways is financed almost entirely by federal funds.

The scope of the court's inquiry in determining whether a grant and conditions attached to it are in the general welfare is narrow. *See Buckley v. Valleo, supra.* Congress has the benefit of hearings, legislative and executive branches and the views of all segments of society in determining what is in the general welfare. This court cannot utilize such fact-finding processes, and is not constituted, as in Congress, to express the national policy through the enactment of statutes. Even if this court were to disagree on the wisdom of the Act, it may not, in this case, substitute its judgment for that of Congress on the question of whether the Act is for the "general welfare."

(3) Whether the Act is within the National power and Policy.

Regulation of roadside outdoor advertising, if within the scope of national policy and power, would be brought there by Congress' power over interstate commerce, U.S. Const., Art. I, Sec. 8, Cl. 3.[2] There can be little doubt that outdoor advertising signs along interstate and primary roads affect interstate commerce. Such signs are intended to exert influence on the traveling public. Public travel is part and parcel of interstate commerce. *See Heart of America Motel v. United States*, 379 U.S. 241 (1964). The highways are channels of interstate commerce. Their construction is

[2] This clause reads as follows:

The Congress shall have Power. . .To regulate commerce with foreign nations, and among the several states and with the Indian Tribes. . . .

largely financed by federal taxation. Congress' intent that roadside advertising be regulated is clearly shown by the Act itself.

The State's contention is, however, that direct regulation of billboards by the federal government would usurp the reserved powers of the states and thus contravene U.S. Const., Amend. 10.[3] A subject can be a national problem and yet be beyond Congress's power as violative of this amendment. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In this regard, a distiction must be made between congressional regulation that directly affects the State's governmental functions, (such as enforcement against State Government of maximum hours—minimum wage requirements for State employees), and regulation that does not affect the State in its sovereign capacity.[4] *National League of Cities, supra*, concerned federal regulations that directly affected rendition of state governmental services by a state. Federal regulation of billboards, on the other hand, directly affects only the landowner and advertiser, rather than the State itself in its sovereign capacity.

The State contends that such a regulation of bill-

[3] This amendment reads as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[4] In *National League of Cities, supra*, Congress has extended minimum wage provisions of the Fair Labor Standards Act to state and local employees. The states and localities were thus *required* by Congress to pay certain wages. They were given no choice in the matter. Here, of course, the State of South Dakota could choose to persist in its refusal to enact compliance legislation, although at this time it appears that the State has chosen to comply. *See* SDCL 31-29-61 through 87 (Supp. 1979).

boards would "impermissibly interfere with [its] integral governmental functions . . .", *National League of Cities, supra*, at 851, by displacing the state's traditional control over land use planning and zoning. It is inevitable that any federal regulation intruding on areas once controlled by the states will diminish the state's power in the area. So long as the *activity regulated* (in this case, outdoor advertising) is not a traditional state function, the Tenth Amendment and *National League of Cities, supra*, will not prohibit Congress from regulating the activity. If it were otherwise, Congress could never extend federal regulation of private business (as distinguished from regulation of the state as a state) to any area previously controlled by the states, because any such extension would, under the State's argument, violate the Tenth Amendment. That Congress' power is not so severly limited is shown by a multitude of decisions from the United States Supreme Court, including: *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, supra; Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Stafford v. Wallace*, 258 U.S. 495 (1922). It is also worth noting that the narrow view taken by cases such as *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Hammer v. Dagenhart*, 247 U.S. 241 (1918) has been specifically repudiated by the later cases.

The State places reliance on the case of *United States v. Butler, supra*. The rationale of this case, however, has been significantly undermined by subsequent cases, particularly *Steward Machine Co. v. Davis, supra* at 592-93 and *Oklahoma v. Civil Service Comm'n, supra*.

Even *Butler* does not support a legal conclusion that

the Highway Beautification Act is unconstitutional. *Butler* held unconstitutional a tax designed to influence or regulate agricultural production. An essential part of this holding was the court's conclusion that Congress had no power to directly legislate so as to control agricultural production. The subject of agricultural production was viewed, in 1936, as outside the scope of national power and policy. This view no longer controls, since later congressional enactments in the area of agricultural production have been upheld. *See Wickard v. Filburn, supra.* In addition, by levying a specific tax on a specific industry, and appropriating funds for the benefit of that industry, Congress was seeking to tax and spend for particular, rather than general, welfare. The farmers in *Butler*, the Supreme Court found, were being coerced to conform their production to a federal standard. The state could not freely exercise its reserved powers to police production within its borders, it was held, so long as the federal government coerced farmers into following a federal program. Finally, the State in *Butler* had no choice; it could not avoid the operation of the Agricultural Adjustment Act by "the simple expedient of not yielding", *Oklahoma v. Civil Service Comm'n, supra* at 143-44.

The Highway Beautification Act does not suffer from any of these infirmities. There is no spending for the benefit of any particular group, but instead, the subject of outdoor roadside advertising along interstate and primary highways is within the national interest, and it was within the power of Congress and the President to declare such a public policy by statute. This case does not present a fact situation of misuse of the tax and spend power to accomplish something the federal government has no right to do

otherwise. The State need not comply, and may cease to comply at any time. *See Steward Machine Co. v. Davis, supra* at 592-93.

(4) Whether the Condition is Directed to the Attainment of a Lawful End

The court also finds and concludes that the end of the grant is within the power of Congress, and that the condition is reasonably adapted to that end. The Congress as indicated above, could choose to regulate outdoor advertising along interstate and primary highways. Withholding part of the highway funds of a state that refuses to regulate such advertising is a means calculated to produce regulation of advertising. As cases cited elsewhere in this opinion indicate, it is a legitimate means to bring about an end, if the end is within the power of Congress. The end, in this case, is within Congressional power.

(5) Whether the Condition Amounts to Coercion.

The State's next contention is that even if the federal government could regulate billboards directly, it could not "commandeer" the State's police power and coerce the State to regulate on behalf of the federal government, *citing District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975) *vacated and rem.*, 431 U.S. 99 (1977) and *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated and rem.*, 431 U.S. 99 (1977), *opinion after rem.*, 566 F.2d 665 (1977). It is well settled, however, that the federal government may require the State to comply with certain conditions in order to obtain funds that the federal

government grants to the State. *Steward Machine Co. v. Davis, supra.* The cases cited by the State recognize this principle. These cases dealt with the attempt by the Environmental Protection Agency to *impose* certain federal regulations on the states by forcing the states, through *direct regulation* to control certain types of automobile pollution. In *Brown* and *Train*, the agency attempted to impose a federal regulatory scheme through which states were *required* to adopt certain regulations or suffer federal sanctions. The states were given no option. The applicability of these holdings to the present case, in which the states *were* given an option (although a painful one) is thus doubtful at best, as the court recognized in *Brown* 521 F.2d at 840:

> Our interpretation is in no way inconsistent with the recognition that Congress has the power to authorize the Administrator to obtain the consent of a reluctant state by conditioning certain federal expenditures within that state on the granting of such consent. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed 1279 (1937).

There is a vast difference between *requiring* a state to adopt certain regulations and denying funding to a state that refuses to adopt them.

This distinction was recognized in *Texas Landowner's Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1028-31 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied sub. nom. Texas Landowner's Rights Ass'n v. Director, Federal Emergency Management Agency*, _____U.S._____ 100 S.Ct. 267, 62 L.Ed. 2d 184 (1979), a *post-National League of Cities v. Usery, supra*, case. In *Texas Landowners*, the State of Missouri, forty political subdivisions in twelve states,

and thirty individual landowners within federally designated flood zones brought suit against federal officials administering the federal flood control program. The portion of this Act alleged to offend the Tenth Amendment required that local governments adopt certain flood plain building regulations under their police powers on pain of losing federal financial assistance for acquistion of construction purposes within non-participating communities. This sanction included denial of FHA and VA home mortgages in affected communities. The plaintiffs in *Texas Landowners, supra*, argued, as does the State in this case, that the severity of the sanctions was such that the "choice" represented no choice at all, but only coercion. The court rejected this contention, holding that coercion is to be found only where the federal government gives the states no choice, but mandates compliance as in *Brown* and *Train*. This was essentially the holding of *Steward Machine Co. v. Davis, supra* at 589-90.

Further, the court is not convinced that the conditioned grant in this case is coercive. The very fact that the State of South Dakota chose not to enact billboard compliance legislation after having been specifically warned of the ten percent penalty shows as much. In addition, congressional debates cited by the Secretary show a definite intention not to be coercive. Congress had originally planned to withdraw all highway funds from non-complying states, but the amount was reduced to ten percent in order to give the states a choice. It is plain that the State could avoid the alleged coercion by the simple expedient of not complying. *Oklahoma v. Civil Serv. Comm'n, supra*, at 143-44. This court therefore concludes that the Act does not violate the Tenth Amendment.

C. *Whether the Secretary's statutory role as decision-maker violates due process when considered in light of his other administrative duties.*

The Act provides that the Secretary must make a preliminary determination of whether to withhold funds from a state at least sixty days before the final determination is made. During this sixty-day period, the State may request a hearing, and after the hearing is held, the Secretary is required to make his final determination of whether the funds should be withheld.

The State contends that the fact that the Secretary has power to make both the initial and final decision and the fact that the Secretary is the official with supervisory powers over the Federal Highway Administration, which was the agency seeking enforcement, constitutes a violation of due process. This is said to be the case because the Secretary is cast in the role of both advocate and decision-maker. 5 U.S.C. 557 prohibits ex parte communications with decision-makers. Supervision and direction of the advocates by the decision-maker would thus be unacceptable and could constitute a violation of due process. There is no evidence on the record, however, that such abuses have taken place. Plaintiffs have offered none and do not now ask for an opportunity to do so. When a party challenges the regularity of administrative proceedings, that party has the burden of proving irregularity. In absence of such proof, it is presumed that administrative proceedings have been properly conducted. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 U.S. 482 (1976); *Withrow v. Larkin*, 421 U.S. 35 (1975). These cases also clearly hold

that, absent evidence of abuses or bias, the combination of initial decision-making power with that of making a final determination does not violate due process.

D. *Whether the Act Unconstutionally delegates Congressional authority.*

The State's next constitutional contention is that Congress, in passing the Act, delegated authority to regulate outdoor advertising to the states without appropriate standards, when it should have regulated outdoor advertising on its own. The State cites *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935) for the proposition that valid Congressional delegation may be made only to officials of the National Government. This principle is indeed contained in the cited case, but it is inapplicable here. As the Secretary points out, the Congress has not directly regulated outdoor advertising, and has not authorized the states to do so. The State's authority to regulate outdoor advertising, or to fail to do so, flows entirely from the State's own sovereignty. That Congress might encourage or induce the State to exercise its sovereignty does not convert that exercise of state sovereignty into an invalid exercise of improperly delegated federal sovereignty. The State is, whether successfully or unsuccessfully, induced to exercise its own sovereignty and to some power delegated to it by the United States Congress. This contention is rejected.

E. *First Amendment Contention.*

The State also contends that the Act violates free speech guarantees of the first amendment, United States Constitution. The State correctly points out

that commercial speech has recently been given first amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizen's Council*, 425 U.S. 748 (1976). We are not, however, required to consider this contention, since the State lacks standing to assert the first amendment rights, if any, of advertisers. The United States Supreme Court has held that a litigant must assert his *own* legal rights and interests, and cannot rest his claim for relief on the rights of others. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Here, the State seeks to assert the rights of persons otherwise free to advertise. It cannot do so. Such advertisers must assert their own rights, if any. It is noted that 23 U.S.C. 131 excludes official state signs, and it thus appears that the State is not being deprived of free speech.

In addition, the State cannot assert this claim as *parens patriae* for its citizens. The State has standing to sue under this doctrine only when "its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens" *Pennsylvania v. New Jersey*, 426 U.S. 660, 665, (1976). In this case, the other contentions of the State obviously involve its sovereign powers. The alleged First Amendment rights, however, are only those of the individual citizens who might choose to erect outdoor advertising. The State is, at best, only a volunteer as to these claims and may not, therefore, successfully assert them.

F. *Additional Constitutional Contentions.*

The State makes a number of additional constitutional contentions. Among these are due process and equal protection challenges, additional arguments based on improper delegation of legislative authority, and a contention that the Act violates the Republican

Form of Government Guarantee Clause, U.S. Const. Art. IV, § 4.[5] The court has carefully considered these challenges. Those other than the guarantee clause challenge are rejected, particularly in view of the fact that the State has cited no authority for its position on these challenges. The guarantee clause is rejected because, as the United States Supreme Court recognized in *Baker v. Carr*, 369 U.S. 186, 223-26 (1962) such challenges raise non-justiciable political questions.

CONCLUSIONS

The court specifically finds and concludes that the Highway Beautification Act is constitutional, and that there is no merit in the State's constitutional contentions. The State's request for a declaratory judgment is denied; the Secretary's motion for summary judgment is granted; and an appropriate order will be entered.

Dated this 7th day of April, 1980.

BY THE COURT:

s/Donald J. Porter
U. S. DISTRICT JUDGE

[5] This clause reads as follows:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

APPENDIX B
District Court Judgment (#77-3039)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA, Plaintiff	)	
vs	)	CIV. 77-3039
BROCK ADAMS, UNITED STATES SECRETARY OF TRANSPORTATION; WILLIAM M. COX, FEDERAL HIGHWAY ADMINISTRATOR: ARTHUR JOHNSON, DIVISION HIGHWAY ADMINISTRATOR and THE UNITED STATES OF AMERICA, Defendants.	)	ORDER AND JUDGMENT

The court having considered the administrative record in the above entitled case, all papers on file, and the briefs and oral arguments of the parties, and good cause appearing, now it is therefore

ORDERED that defendants' motion for summary judgment in the above entitled case be, and hereby is, in all things GRANTED, and it is further

ORDERED that plaintiffs' motions for summary

judgment, for a declaratory judgment and for preliminary and permanent injunctive relief be, and hereby are, in all things DENIED,

All in accordance with the court's memorandum opinion of April 7, 1980, in the above entitled case, and further in accordance with this court's memorandum opinion in Civil Case No. 78-3051, insofar as the memorandum opinion in 78-3051 is applicable to the issues raised in this case.

Dated this 9th day of April, 1980.

BY THE COURT:

s/Donald J. Porter
U.S. DISTRICT JUDGE

ATTEST:

WILLIAM J. SRSTKA, CLERK
BY: s/Judy L. Harvey
Deputy

(SEAL OF COURT)

APPENDIX C
District Court Opinion (#78-3051)

April 7, 1980

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RE: STATE OF SOUTH DAKOTA, Plaintiff
vs
BROCK ADAMS, UNITED STATES SECRETARY OF TRANSPORTATION; KARL BOWERS, FEDERAL HIGHWAY ADMINISTRATOR;WILLIAM S. WESEMAN, DIVISION HIGHWAY ADMINISTRATOR and THE UNITED STATES OF AMERICA, Defendants
CIVIL NO. 78-3051

Gentlemen and Ms. Scolnick:

MEMORANDUM OPINION

SUMMARY

This action was brought by the State of South Dakota [State], against the United States Secretary of Transportation [Secretary]. The state seeks to overturn the Secretary's final determination and order of November 9, 1978, because the order and determination is alleged to be arbitrary and capricious and to be based on a record not containing substantial evidence to justify it. The factual and legal background is set forth in this court's memorandum opinion in Civ. 77-3039, which deals with the constitutionality of 23 U.S.C. § 131 [The Act].

The administrative hearing from which the factual record in this case was made was held before an administrative law judge on December 12-15, 1977, at Pierre, South Dakota. The Secretary issued his final determination and order on November 9, 1978. The State commenced this action, asking for review of the Secretary's action, on December 7, 1978. Both parties have moved for summary judgment and filed briefs and memoranda in support of their motions. The court first heard oral argument in this case on August 10, 1979, at which time the State sought and was granted leave to file an amended complaint. The State also requested and was granted permission to file supplemental briefs in support of contentions made and refined in the amended complaint. The Secretary duly responded to these briefs and to the amended complaint. At the request of the State, further argument was heard on October 19, 1979, and the parties have filed further briefs and affidavits since that time.

The court now finds and concludes that the Secretary's order is not arbitrary and capricious and that it is based on substantial evidence. The order is, therefore, affirmed.

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ISSUES

The following issues are presented by the record in this case:

I. What scope of review should be employed?

II. Does the administrative record justify the Secretary's decision and order?

DECISION

I. *SCOPE OF REVIEW*

The State has asked for a trial de novo in this court case. The exact grounds are unclear. The request,

although contained in the complaint, is not pressed in the State's briefs. The State seems to reason that since the procedure employed was a denial of due process, and since the Secretary acted in an arbitrary and capricious manner, the matter should be heard de novo. This contention is without merit. The proper remedy for any such violation would be a remand for new and untainted fact-finding, rather than a usurpation of the Secretary's factfinding function by this court. There is little if anything new which the State would present to the Court on a trial de novo. Apparently, the State seeks to have this court substitute its judgment on the factual issues for that of the Secretary. There is no statutory provision for such a scope of review, and this court has no authority to grant such a review of the facts. *South Dakota v. Volpe*, 353 F. Supp. 338, 342 (D.S.D. 1973).

The State is, however, entitled to a review of the Secretary's final determination under the provisions of 23 U.S.C. § 131(1). The scope of review is not specified by Section 131(1). In the absence of any particularized standard of review, the proper standard is the substantial evidence standard found in 5 U.S.C. § 706.

The nature of the substantial evidence standard was considered at length in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Initially, the standard is applicable only where the agency action is taken pursuant to the rule-making power of the Administrative Procedure Act or when the agency action is based on a public adjudicatory hearing. *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971). The condition is fulfilled here, since a public adjudicatory hearing was held in this case. In *Universal Camera, supra* at 477, the Supreme Court indicated that substantial evidence is "more than a scintilla. It means such relevant evidence as a reasonable mind might ac-

cept as adequate to support a conclusion." Substantial evidence was also equated with the amount of evidence necessary to deny a motion for a directed verdict and to justify submitting a case to a jury, where a trial is by jury. The reviewing court must draw its conclusions by reviewing the entire record. The evidence detracting from the Secretary's determination must be considered, as well as that tending to support it. This does not mean, however, that the court is to weigh the evidence. The only question is whether all the evidence on the record, taken as a whole, fairly supports the Secretary's determination. *Universal Camera, supra.* The sufficiency of the evidence will be reviewed under this standard.

The State further contends that the Secretary's determination should be set aside because it is arbitrary and capricious 5 U.S.C. 706 (2)(A). Agency action may be arbitrary and capricious even if supported by substantial evidence. *Bowman Transportation, Inc. v. Arkansas Best Freight System*, 419 U.S. 281, 284 (1974).

The arbitrary and capricious standard calls for an "inquiry into the facts [that] is to be searching and careful", but "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra* at 416. In reviewing administrative action under this standard, the court must determine whether the decision was based on relevant factors and whether there has been a clear error of judgment. The court may not substitute its judgment for that of the agency, and if the record fairly supports the Secretary's exercise of discretion, that discretion is not to be interfered with. *Citizens to Preserve Overton Park, supra.* The agency must give a reasoned basis for its action. The Court will not supply a basis on which the agency did not rely. A decision will, however, be upheld, even

when it is of less than ideal clarity, if the agency's path may be reasonably discerned. *Bowman Transportation v. Arkansas Best Freight System, supra.*

II. *Whether The Record Justifies the Secretary's Determination.*

A. *Introduction.*

(1) Relevant Provisions of the Highway Beautification Act.

The Secretary of Transportation is given authority to determine compliance with the Act. A ten percent penalty of federal funds allocated to states for highway construction is levied under the Act against states that do not comply. The purpose of the Act is stated as follows:

> The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty. 28 U.S.C. § 131(a).

In order to comply with the Act, and avoid the ten percent penalty, a state is required to prohibit all signs within the control zone, with the exceptions set out below. The control zone was initially defined as being that within 660 feet of interstate and primary highway rights-of-way. This was later expanded to include the area more than 660 feet from the rights-of-way, if signs within this later zone were visible from the highway and erected with the purpose of being read from that highway. The following signs may be permitted, even though they are within the control zone:

(1) Directional and official signs in accordance with

rules promulgated by the Secretary;

(2) Signs advertising sale or lease of the property on which they are located;

(3) Signs advertising activities on the property on which they are located;

(4) Signs in existence on October 22, 1968, determined by the State to be of intrinsic historic value, when such determination is approved by the Secretary; and

(5) Signs advertising distribution of free coffee to motorists by non-profit groups. 23 U.S.C. § 131(c).

These categories and the regulations under the Act, 23 C.F.R. 750.153, do not authorize erection and maintenance of certain types of signs which were allowed under South Dakota law relevant to this action. The Act does, however, provide the following exemption:

> The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area. 23 U.S.C. § 131(o).

Signs are also permitted in areas zoned commercial or industrial, or in unzoned commercial or industrial

areas, in accordance with agreements between the Secretary and the State, 23 U.S.C. § 131(d). If the State certifies comprehensive local controls setting size, lighting and spacing standards, these will govern in lieu of an agreement insofar as signs are within commercial and industrial areas zoned or unzoned. *Id.* States are free to impose stricter controls than those called for in the Act. 23 U.S.C. § 131(k).

Signs permitted under any of the above provisions, except Subsection 131(o), are known as conforming signs. These may be maintained so long as they continue to conform to state law. Non-conforming signs (those not fitting within the above provisions) must be removed as federal funds become available to pay compensation for their removal. Signs that are non-conforming, but which come within the provisions of Subsection 131(o) are not subject to removal.

Signs erected in violation of state law at the time of their erection (illegal signs) must also be removed, but no compensation is paid for them. Owners of conforming or non-conforming signs must be compensated if the signs are removed, and the federal government is required to pay seventy-five percent of the cost of removal and compensation to sign owners, 23 U.S.C. §§ 131(g), 131(n). This is apparently also the case if conforming signs are removed because the State law is more strict than § 131.

Further, provisions of the Act and the regulations under it will be set forth as they become relevant.

(2) General Considerations.

The State argues that the Federal Highway Administration was required to prove that specific signs located on South Dakota roads at the time of the hearing were out of compliance with the appropriate

federal standards. The Federal Highway Administration, on the other hand, contends that highway funds may be withheld if South Dakota law regulating outdoor advertising does not regulate in a way compatible with federal law. The question is essentially one of whether Congress sought to penalize the State for failing to adopt regulations or for having improper signs within its borders. The distinction is important since the Highway Administration presented very little evidence of signs actually out of compliance.

The Highway Administration's position is more reasonable. It is clear from 23 USC § 131 that Congress intended to regulate future erection of billboards. If the Secretary could not find a state out of compliance until non-conforming signs were erected and if those non-conforming signs were not prohibited by state law, the owners would be entitled to compensation for removal of the signs. 23 U.S.C. § 131(g). If the Secretary were not permitted to determine compliance by considering whether state law conformed to federal law, he could only judge results. He would be forced to inspect the results of state law and not the state law itself. This would entail waiting until after non-conforming signs were erected to determine that the State's control program was insufficient. The language of the Act makes it plain that Congress sought the adoption of conforming laws by the States. If the States do not adopt such laws, they are subject to a ten percent penalty.

B. *Whether SDCL Ch. 31-29 complies with the Act.*

The Secretary found that South Dakota law did not meet federal standards in a number of specific areas:

(1) Directional signs;

(2) Urban area-municipality distinction;

(3) The State's inability to enter into a 23 U.S.C. § 131(d) agreement.

(4) The State's statutorily mandated moratorium on removal of "directional" signs.

This finding will be reviewed in light of the above standards of substantial evidence and arbitrariness.

(1) *Directional Signs*

As noted above, 23 USC § 131(c) allows erection of directional and official signs and notices. The Secretary's delegate, the Federal Highway Administration, has promulgated regulations pursuant to this subsection defining directional signs. 23 CFR § 750.153-154. The definition of directional signs is located in § 750,153(r)[1] and does not include, as does the State definition in effect at the time relevant to this case[2] the advertisement of goods and services of businesses catering to the traveling public.[3]

The State admits this discrepancy, but argues that the Highway Administration had no authority to promulgate the regulations because (1) Congress intended to leave to the states the task of defining what con-

[1] 23 CFR § 750.153(r): Directional signs means signs containing directional information about public places owned or operated by Federal, State or local governments or their agencies; publicly or privately owned natural phenomena, historic, cultural, scientific, educational and religious sites; and areas of natural scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public.

[2] SDCL 31-29-62(2): "Directional sign, display or device providing directional information about goods and services in the interest of the traveling public", any sign, display or device giving directional information pertaining to food services, lodging, gasoline and automotive services, resorts, attractions, camp-

stitutes directional signs and (2) Congress, by amending the language of § 131(c) from "directional and *other* official signs" to "directional and official signs" intended to allow non-official directional signs. The Act specifically gives the Secretary authority to promulgate regulations necessary to implement the section. If Congress had not intended to give the Secretary authority over such matters, it would presumably not have granted such power. To concede that the Secretary has power to enforce controls over size, lighting, spacing and other sign characteristics but not power to control the type of sign is inconsistent with the comprehensive nature of the Act. Further, the elimination of "other" does not dictate a contrary result. There is little, if any, legislative history concerning this amendment. The Congress considered but rejected an amendment that would have used language virtually identical to that contained in South Dakota Law. S.Rep. No. 93-355, 93rd Cong. 1st Sess. 63 (1973);

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grounds, truck stops, natural wonders, scenic and historical sites, and areas suited for outdoor recreation or business catering to the traveling public.

SDCL 31-29-63(1): Directional and official signs and notices, as authorized or required by law, which signs may include, but shall not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions, and directional information concerning goods and services of businesses catering to the traveling public.

[3] The House of Representatives proposed addition of the phrase "information in the specific interest of the traveling public, including, but not limited to, signs for rest stops, camping grounds, truck stops, food services, gas, and automotive services, and lodging." This amendment was rejected by the Senate, a committee of which indicated that directional signs should be limited to those disseminating noncommercial information. S. Rep. No. 93-1111, 93rd Cong. 2d Sess. 13 (1974); H.R. Rep. No. 93-1567, 93rd Cong. 2d Sess. 4 (1974).

S.Rep. No. 93-1111, 93rd Cong. 2d Sess. 13 (1974); H.R. Rep. No. 93-1567, 93rd Cong., 2d Sess. 4 (1974); H.R. Rep. No. 94-716, 94th Cong., 1st Sess. 12 (1975); S. Rep. No. 94-741, 94th Cong., 2d Sess. 48-49 (1976). Also, the definition in § 750.153(r) does include non-official signs. It is thus not inconsistent with § 131(c), even after Congress eliminated the "other".[4]

South Dakota law on directional signs also fails to comply with federal standards on size, lighting, spacing and number of signs permitted. South Dakota standards are set forth in SDCL 31-29-64 to 67. Section 31-29-64 applies to all outdoor advertising and requires that there be no signs erected within 500 feet of an interchange on certain interstate and limited access highways. The federal standards, 23 CFR 750.154(d)(2) and (3) prohibit signs within 2,000 feet of such interchanges, and include parks, scenic areas and rest areas on unlimited access primary highways.

In addition, the South Dakota size, (SDCL 31-29-65) lighting, (SDCL 31-29-60) and spacing (SDCL 31-29-67) criteria do not conform to the federal criteria in a number of respects. The most serious discrepancy is that they fail to apply to any sign located outside a zoned or unzoned commercial or industrial area. Thus, any sign erected outside commercial or industrial areas is not subject to any size, lighting or spacing requirement. Other respects in which the South Dakota statutes fail to conform are as follows:

a. SDCL 31-29-65 permits signs to a size of 1,200

[4] This amendment was adopted subsequent to the Highway Administration's promulgation of the regulations. The Highway Administration made no change in its regulations, since it did not believe that the amendment required a change. Congress has not amended § 131(c) since 1975. See 40 Fed. Reg. 21934 (1974).

square feet. The federal standards, 23 CFR 750.154(b)(1)(i) permit a maximum size of 150 square feet;

b. SDCL 31-29-67(2) allows signs to be erected within 500 feet of one another on interstate highways and within 300 feet of one another on primary highways. The federal standards, 23 CFR 750.154(d)(4)(i) require at least a mile between the signs.

c. SDCL 31-29-64 to 67 do not prohibit more than three directional signs in the same direction of travel relating to the same activity, as does 23 CFR 750.154(d)(4)(ii). South Dakota also does not prohibit directional signs more than seventy-five (interstate system) or fifty (primary system) air miles from the activity. 23 CFR 750.154(d)(4)(iii) and (iv).

d. South Dakota does not limit message content on directional signs to identification and directional information, as do the federal standards 23 CFR 750.154(e).

The State admits these discrepancies, as it must, since they are plain on the face of the statutes and regulations. The State contends, however, that the regulations are inconsistent with 23 USC § 131 and the legislative intent behind the Act, that the discrepancies are minor in nature, and that the discrepancies can be reconciled by application of 23 USC § 131(o). The § 131(o) issue is discussed later in this opinion.

The Highway Beautification Act explicitly gives the Secretary authority to promulgate regulations relative to directional signs. 23 U.S.C. § 131(c)(1). This authority has been delegated to the Federal Highway

Administration, which has duly promulgated the regulations found at 23 CFR 750.153-54. When authority is thus expressly delegated, a reviewing court does not have the power to set aside the regulations simply because the court might have interpreted the statute in a manner different from the agency's interpretation. *Batterton v. Francis*, 432 U.S. 416, 425-26, (19 7). The regulations under § 131(c)(1) are not merely interpretative, but rather, legislative regulations. They have the force and effect of law and can be set aside only if they clearly exceed the Secretary's statutory authority or are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. §§ 706(2)(A) and (c); *Batterton v. Francis, supra*, at 425-26. The record is barren of any evidence that the rules constitute this type of abuse. The court might have adopted different standards, but Congress did not assign the task of adopting such standards to the court. The regulations were adopted under express authority and have been in place since 1973. Congress has not acted to change them. Since their adoption is not clearly outside the statutory mandate, the regulations cannot now be set aside merely because this Court might interpret § 131(c)(1) differently. *Batterton v. Francis, supra.*

The State's contention that the discrepancies between state and federal law are minor must also be rejected. The Secretary, who has the initial task of fact finding under the Act, found otherwise. This determination should not lightly be set aside, since the Secretary has considerable experience in interpreting and applying the Act.[5] In addition, the South Dakota

[5] The Secretary has little authority over matters of law but some deference is due to the Secretary's interpretation of the Highway Beautification Act. Although 5 U.S.C. § 706 requires the court to interpret statutory provisions, the court can seek

statutes, when compared with billboard regulation in the other forty-nine states, permit far larger signs, with much closer spacing than the regulations in any other state. As this court stated in *South Dakota v. Volpe, supra*, certain standards have been established through experience with the Act. There can be little doubt that South Dakota directional sign regulations are outside these standards, and the Secretary therefore did not abuse his discretion in finding that South Dakota had not complied with the Act.

(2) *Urban Area — Municipality Distinction*

23 U.S.C. § 131(b)[6] provides that certain outdoor advertising devices must be controlled, even though they are more than 660 feet off the right-of-way of either the interstate or primary road systems. In order to be sub-

guidance from agencies and other entities having experience in applying and interpreting particular legislation. *Vermont v. Brinegar*, 379 F.Supp. 606, 612-13 (D.Vt. 1974). The Secretary has such experience and his interpretation should thus be given some weight even where the Court is required to make its own interpretation of the statute.

[6] 23 U.S.C. § 131(b):

Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, *located outside of urban areas*, visible from the main traveled way of the system and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under Section 104 of this title, until such time as such State shall provide for such effective control. . . . [Emphasis supplied]

ject to control, these devices must be located outside "urban areas". The Federal Highway Administration has interpreted this to mean urban areas as defined by 23 U.S.C. § 101(9). 23 CFR § 750, 703(m). Such urban areas must have populations of 5,000 or more and be within boundaries fixed by collaboration of state and local officials, subject to approval by the Secretary. There are fourteen such areas in South Dakota. SDCL 31-29-63[7] provides that the zone beyond 660 feet is to be controlled only outside the corporate limits of a municipality. An exhibit prepared by the State Highway Department shows that there are 264 incorporated municipalities in South Dakota. A municipality may have as few as 100 residents and 30 qualified electors. SDCL 9-3-1. Although not all of the municipalities are located on the interstate or primary systems, the State's highway map shows that at least twenty non-urban area municipalities are on the interstate, and perhaps one hundred or more are on the primary system.

The State insists that no advertiser would erect a sign in a municipality where the sign would have to be more than 660 feet from the right-of-way. Such argument is irrelevant, but in any case, as the Highway Administration points out, the possibility of such signs is not remote. This is particularly so with the interstate system, which often bypasses smaller towns. If the

[7] SDCL 31-29-63:

No outdoor advertising shall be erected within six hundred sixty feet of the nearest edge of the right-of-way and visible from the main-traveled way or beyond six hundred sixty feet of the nearest edge of the right-of-way visible from the main-traveled way located outside the *corporate limits of a municipality* and erected with the purpose of its message being read from the main-traveled way of the interstate or primary systems. . . . [Emphasis supplied].

interstate were, for example, five hundred feet from the corporate limits of a municipality, any advertising device could be erected 160 feet or more within the corporate limits without being controlled under South Dakota law. Yet, § 131(b) itself requires control within this zone. It is therefore clear that South Dakota law provides greater opportunity for construction of advertising devices within this area than § 131(b). The Secretary's determination was thus correct on this phase of the case.

(3) *Section 131(d) Agreements.*

A. Generally

23 USC § 131(d)(10)[8] requires the State and the Secretary to enter into agreement on what areas will be considered unzoned commercial and industrial

[8] 23 U.S.C. § 131(d):

In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section. [on-premises advertising].

areas for purposes of the Act. The Secretary states in his final determination that a state cannot provide for effective control without the agreement. The State of South Dakota had no such agreement with the Secretary or his delegate following *Hogan v. S.D. State Dept. of Transportation, supra,* until December, 1979.

The State contends that the absence of an agreement is due to the refusal of the Secretary or his delegate to negotiate with the State. The State in argument has admitted, however, that the only terms it would or could accept in such an agreement were those contained in SDCL Ch. 31-29.[9] Both the Federal Highway Administration and the Secretary found these terms totally unacceptable, and so informed the Legislature both before and after passage of the 1977 amendments to Ch. 31-29.

The State, in effect, offered to enter into an agreement based on the provisions of Ch. 31-29 (as amended 1977). If these provisions are sufficient to comply with the Act, the Secretary or his delegate was not justified in refusing to enter into an agreement. If, on the other hand, SDCL 31-29 is not sufficient to constitute effective control, the Secretary would not be required to agree to its terms.

The areas for agreement under § 131(d) are the extent of "unzoned commercial and industrial areas" and the size, lighting and spacing criteria within such areas. The Secretary, in his final determination, found South Dakota size, lighting and spacing standards suf-

[9] Presumably the State and the Secretary could now enter into an agreement on terms more acceptable to the Secretary, pursuant to 1979 S.D. Sess. L. Ch. 202 (approved March 13, 1979). That chapter is irrelevant to the present case, however, since it was approved after the Secretary made his final determination.

ficient insofar as they regulated signs in zoned and unzoned commercial and industrial areas.

B. Extent of unzoned commercial and industrial areas.

SDCL 31-29-70 defines unzoned commercial and industrial areas. It permits outdoor advertising on both sides of the highway, and within one mile on either side of any commercial or industrial activity except other outdoor advertising. All land within one thousand feet of any highway, if traversed by any railroad right-of-way, is also included. In addition, if any "pockets" of land not considered zoned or unzoned commercial or industrial of 1,000 feet or less are between areas considered zoned or unzoned commercial or industrial, such "pockets" are also unzoned commercial or industrial for outdoor advertising purposes. Finally, any board of county commissioners is given power to determine what additional areas are appropriate for outdoor advertising, and to declare these areas to be unzoned classification. The commissioners also have the power under SDCL 31-29-70 to determine that certain parts of the county are not appropriate for outdoor advertising, even though they would otherwise be appropriate under SDCL Ch. 31-29. The total effect of SDCL 31-29-70 would appear similar to that of the strip zoning rejected in *South Dakota v. Volpe, supra.*

The Federal Highway Administration refused to agree to the above provisions because the provisions allegedly made effective control impossible, because the provisions were inconsistent with regulations implementing 23 USC § 131(d)[10] and because they did not conform to the broad outlines of agreements made

[10] 23 C.F.R. 750.703(1):

Unzoned commercial or industrial areas are *unzoned areas* ac-

with other states. 23 CFR 750.703(1) requires that the areas be unzoned, that they actually be used for commercial or industrial purposes, and that the areas be defined in agreements between the Secretary and the states. SDCL 31-29-70 violates at least the first two of these conditions, since it gives local authorities the right to convert zoned areas into "unzoned commercial or industrial" areas and because it authorizes non-commercial or industrial areas to be used for outdoor advertising if they fall into "pockets" of less than 1,000 feet. It also gives local authorities the power to allow outdoor advertising in any area that they feel is appropriate for such advertising, regardless of any zoning or planning for other purposes.

The State contends that Congress intended to allow individual states to determine the zoned and unzoned areas for themselves, and that any national standards on the matter are outside the authority of the Secretary. The legislative history cited in support of this proposition, however, referred to *zoned* areas not *unzoned* areas. Further, as this Court said in *South Dakota v. Volpe*, *supra*, at 341:

> But through experience gained in administering the Act criteria of general applicability nationally [have] been formulated for comparison with those state standards submitted for approval. Charged with administering the Act and preserving the stated purpose from the caprice of the individual states, the Secretary established these generally accepted criteria as a floor to acceptable alternatives. This court

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tually *used for commercial or industrial purposes* as *defined in agreements made between the Secretary, . . . and each state* pursuant to 23 U.S.C. § 131(d) [emphasis supplied].

> concludes that the Secretary so pursuing the Congressional policy of general uniformity across the nation reasonably determined that South Dakota's provisions failed to obtain the level of any standards previously accepted and, therefore, finds South Dakota's provisions unacceptable.

The same applies to this case. Not only are South Dakota's provisions in conflict with 23 CFR 750.703(1), but they are far from the provisions of any of the agreements made with other states, all of which are summarized in the record. No other state allows outdoor advertising more than 1,000 feet from commercial and industrial activities within unzoned areas. The other states control outdoor advertising in non-commercial, non-industrial "pockets". Some states permit advertising only on the same side of the highway as the commercial or industrial activity. Other states do not allow local boards to "unzone" strictly to allow outdoor advertising. The Secretary's determination on this phase of the case is, therefore, supported by the record and in accordance with the law.

(4) *The moratorium on directional sign removal.*

1977 S.D. Session Laws, Ch. 247, § 3[11] forbids

[11] 1977 S.D. Sess. L. Ch. 247, § 3:

No outdoor advertising relating to directional information concerning goods or services provided the traveling public shall be removed or caused to be removed by the state, or by any political subdivision without the owner's consent unless consistent with local ordinance, until further enactment of express legislative authority. No permit, license or other authority shall be required for the erection or maintenance of outdoor advertising which shall, as other land uses, be controlled exclusively by local authority pursuant to SDCL 11.

Because this section was part of a temporary chapter, Ch. 247,

removal of any outdoor advertising relating to directional information in the interest of the traveling public without prior approval of the legislature. This section clearly conflicts with the Act, the purpose of which is to eliminate non-conforming outdoor advertising, much of which includes the type of advertising that cannot be removed because of this section.

The State argues that the moratorium is justified by 23 U.S.C. §§ 131(q)(2) and 131(o). These arguments must be rejected. § 131(q)(2) states that directional signs of this type should be the last signs removed. It does not state that their removal can be prohibited indefinitely as does ch. 247, § 3. The Secretary has implemented 131(q)(2) by putting this type of sign at the bottom of the federal priority list, 23 C.F.R. 750.304(a), as has the State, SDCL 31-29-81. Neither the Act [§ 131(q)(2)] nor the regulations under it, however, justify a moratorium on sign removal.

The State also argues that a moratorium was necessary in order to preserve signs pending an economic hardship exemption under 23 U.S.C. § 131(o). The moratorium is, however, much too broad to be excused as aiding a § 131(o) application. The moratorium applies to illegal signs and to those erected after May 5, 1976, both of which are not protected under any interpretation of § 131(o). Given the fact that both state and federal law place this type of directional sign at the bottom of the removal priority list, it does not appear that the extreme step of a moratorium would be of any aid to the State in a § 131(o) exemption application.

C. *The State's Arguments Regarding Compliance.*

requiring a Legislative Research Council study of outdoor advertising, it was never codified in SDCL. Ch. 247 was House Bill 927 of the 1977 South Dakota Legislature.

The State makes several arguments on the issue of compliance. It is argued for the following reasons that either the State is in compliance or that it has made a good faith attempt to comply with the Act:

(1) The State's record of billboard removal is near the top of the list of all the states; and

(2) The Act was not intended to apply equally to all states, but was to be flexibly applied to differing situations.

(1) *The State's record of billboard removal.*

It is clear that the State has, since the Act was passed removed a large number of billboards. According to exhibits offered by both the State and the Highway Administration, over 20,000 signs have been removed and perhaps 7,000 remain. Of these, it was estimated that 5,000 do not comply with the Highway Beautification Act. The State contends that this record of billboard or sign removal in and of itself shows compliance with the Act, or at least a good faith attempt to comply. In light of the State's failure to enact statutes governing outdoor advertising, however, this argument must be rejected.

It is undisputed that the State was in compliance with the Act until the *Hogan* decision was rendered. During this time, many non-conforming and illegal signs were removed, and others were doubtless prevented from being erected by the State's complying regulation of outdoor advertising. Between the date of *Hogan* and March 13, 1979, however, the State was not in compliance with the Act. Pre-*Hogan* sign removal cannot change the fact of non-compliance.

The question is not simply a matter of theoretical distinction between state and federal law. SDCL Ch. 31-29 provided little protection against future erection

of billboards, no matter what the record of removal in the past might have been. In short, under Ch. 31-29, it was reasonable for the Secretary to expect that many non-conforming billboards would be erected to replace those that had been removed. It is the legitimate concern of the Secretary that the Highway Beautification Act be complied with in the future as well as in the past. Conforming state regulation, to effectuate the public policy of the Act, must be continuous, not intermittent. For these reasons, the State's argument based on billboard inventory statistics must be overruled.

(2) *Flexibility of the Act*

The State's second argument regarding compliance with the Act is that the differences between federal and state regulations should be disregarded because of the unique position of South Dakota vis-a-vis other states. It is argued that the Act, referring specifically to subsections 131(b), 131(o) and 131(g) was intended to be a flexible instrument that would be applied differently to different states. Since South Dakota is a rural state with few urban areas and relatively few industrial and commercial areas, it is argued an "inflexible national standard" should not be applied here. This is said to be particularly the case where the state is heavily dependent upon tourism as a source of jobs and state revenue. It is argued that the Secretary and the Federal Highway Administration have not taken into account the differences between states in applying the Act. The Highway Administration argues that there are differences in the billboard regulations in the several states. Differences are tolerated, it is argued, but certain standards have emerged through experience and these are typified by Highway Administration regulations, and the agreements between all the other states and the Highway Administration. (*South*

Dakota v. Volpe, supra). South Dakota law is, as shown by the discussion above, far out of line with both existing state agreements and Highway Administration regulations.

Whatever merit the State's flexibility argument may have, there can be little doubt that Congress intended more regulation of outdoor advertising than was accomplished by the 1977 amendments to SDCL Ch. 31-29. Particularly, with regard to the extent of unzoned commercial and industrial areas, these amendments amount to no effective regulation of outdoor advertising at all. State law, as it stood until March 13, 1979, would not place *any* restriction on the areas in which outdoor advertising could be erected, provided the local board of county commissioners agreed that all areas within the county should be open to such advertising. The State is not in a good position to claim that the Secretary should be "flexible" when it has failed to prohibit outdoor advertising in any areas.

(3) *Scenic Attractiveness.*

The Administrative Law Judge in this case also found that much of South Dakota is unattractive and that billboards contributed to safety, since they gave drivers something to look at while driving through boring landscape. He therefore concluded that more billboards should be allowed in places that lack scenic merit. This appears to have been a subjective conclusion, arrived at after the Administrative Law Judge drove from the Black Hills area to Pierre. The Act contains no such exception. Though the Administrative Law Judge did cite some legislative history about billboards obstructing trees, the Act was not intended to protect the view of only those areas that a particular judge might find to be of scenic merit. As the Secretary pointed out, citing floor debate on the Act, what

one person might wish to view in the way of scenery can differ from what another would want to view. Thus, in absence of a Congressional declaration requiring that subjective impressions of scenic beauty be considered, it is preferable to apply the law equally to all areas. It is not the prerogative of any court or judge to determine, other than under standards promulgated by Congress or an agency acting under a valid Congressional delegation, what portions of the landscape should or should not be obstructed by billboards.

D. *Whether the Secretary abused his discretion in failing to suspend the penalty on the fiscal year 1978 funds, pursuant to 23 U.S.C. § 131(b).*

23 U.S.C. § 131(b) provides that the Secretary may suspend the effect of the ten percent penalty on a finding that such a suspension would be "in the public interest". The State argues that the penalty should have been suspended in this case because:

(1) Compliance would have an adverse economic impact on the State;

(2) The State made a "good faith attempt" to comply;

(3) The State's failure to enact complying legislation in 1978 was occasioned by the Secretary's delay, until November, 1978, in rendering his final determination and order;

(4) The Secretary abused his discretion in treating fiscal year 1978 payments (which were withheld and redistributed to the other states) differently from fiscal year 1979 payments (which were to be returned to the State if it complied by March 31, 1979).

(1) *Economic Impact of Compliance*

At the administrative hearing, the State presented a great deal of evidence on the cost of compliance. An

economics professor from the University of South Dakota testified, and introduced a study indicating that fifty million dollars in income and taxes could be lost if the State complied fully and removed all non-conforming billboards. Several owners of tourist attractions also testified. In their opinion, the study was conservative and they believed the losses would be greater. The Federal Highway Administration presented an economics professor from another University, who indicated that the study was invalid because it was based upon biased questionnaires and because it grouped regions of the state improperly when assessing the economic impact of billboards. The Administrative Law Judge recommended that the Secretary suspend the ten percent penalty because of this economic impact. The Secretary refused to do so. He held that the public interest exception contained in 23 U.S.C. § 131(b) was, according to legislative history, intended only to aid states that were making an effort to comply but were unable to do so because of unavoidable delay.

The State argues on appeal that this determination was incorrect in light of recent amendments to § 131, particularly subsections 131(o) and 131(q). The State interprets these sections as broadening the Secretary's discretion, and also, the factors he must consider when granting or denying a suspension of the ten percent penalty under 23 U.S.C. § 131(b).

These statutes do not, however, provide for the type of relief the State seeks. Section 131(o) is a carefully circumscribed statute allowing exemptions for certain carefully defined signs in specific areas delineated by a state. It does not excuse statewide non-compliance with the Congressional mandate of § 131(b). The State presumably expected to remain permanently out of compliance over the entire state, since it had not delineated which areas would be hard hit economically by

compliance, nor had it indicated that it would come into compliance if the Secretary would "suspend" the penalty. It is significant that the suspension provision of § 131(b), when originally passed, was intended for use as an aid in bringing states into compliance.[12] It is also significant that Congress adopted separate subsections, with carefully circumscribed requirements, when it decided that economic hardship should be considered. Since the State has not complied with the procedures required by these economic hardship sections, any claim for relief under them is without support in the record. The State cannot expand the public interest exception of § 131(b) to include matters clearly not contemplated when that section was enacted, absent some indication that Congress intended the subsection to be so expanded. Enactment of carefully circumscribed subsections 131(o) and 131(g) is not such an indication.

(2) *The State's good faith attempt at compliance.*

The State argues that the Secretary should have suspended the ten percent penalty because of the State's good faith attempt at compliance. As evidence of this attempt, the State offers its record of billboard removal, alluded to above. This record, however, is concerned with what the State has done in the past. The Secretary was, on the other hand, concerned with present regulation and with what billboards would be erected and taken down in the future. The State conceded that there were approximately 5,000 non-conforming billboards remaining.

Whatever the State's record for billboard removal

[12] S. Rep. No. 709, 89th Cong. 1st Sess. 1, 4, indicates that the penalty suspension provision was primarily for the purpose of allowing legislatures that had to amend their constitutions or go through other lengthy procedural steps in order to adopt complying legislation, to do so without loss of highway funds.

may have been in the past, it is not likely to be satisfactory under a statute *prohibiting* future removal of billboards. 1977 S.D. Sess. L. Ch. 247, § 3. Moreover, the discrepancies between the 1977 South Dakota statutes and the Act are quite plain on the face of the statutes, as the above discussion indicates. The legislature was not, however, restricted to its own evaluation of whether the State was in compliance. The Federal Highway Administration gave the legislature a detailed evaluation of the bills before it, and indicated specific objections. It also stated that one bill would comply with only minor amendments. The Secretary also wrote to the Governor, urging the State to comply. The Highway Administration several times said that it would help to bring the State into compliance. The legislature nonetheless enacted the 1977 legislation, which was patently out of compliance. Such action does not comport with a "good faith attempt" to comply.[13]

(3) *Whether the penalty should be suspended because delay in rendering the Secretary's decision allegedly caused the State not to adopt complying legislation in 1978.*

The State argues that if the Secretary's final decision had been rendered prior to January, 1978, the State would have adopted compliance legislation during the 1978 session. This argument ignores the fact

[13] The Federal Highway Administration also introduced documents showing its efforts to bring the State into compliance during the 1978 legislative session. These were not admitted by the Administrative Law Judge, because they allegedly constituted evidence of settlement offers. Although he found this rationale questionable, the Secretary did not overturn the failure to admit the documents. These documents have not, therefore, been considered by this court on the question after State's alleged good faith attempt at compliance.

that adoption of such legislation would *not* have required the Secretary to suspend the penalty for fiscal 1978 funds, which were apportioned to the State as of late 1977. Considering the entire record in this case, and given the fact that the *1977* legislature (meeting in January-March, 1977) failed to enact complying legislation, it was within the discretion of the Secretary under the Act to redistribute the fiscal 1978 funds. Indeed, absent an affirmative finding that it would be in the "public interest" to suspend the penalty, 23 U.S.C. § 131(b) requires its imposition.

A state seeking to avoid the ten percent annual penalty can determine from the provisions of the Act alone what must be done. The 1978 Legislature was composed of the same legislators who in 1977 adopted non-complying legislation, notwithstanding the Secretary's efforts to work out a complying statute. Nothing in the record indicates the inaction of the legislature as to compliance legislation in 1978 was anything but an independent expression of the will of a legislative majority.

(4) *Whether the Secretary abused his discretion in treating the fiscal 1978 funds differently from the fiscal 1979 funds.*

The order states that the fiscal year 1978 funds are to be withheld and reapportioned to the other states and that the fiscal year 1979 funds are to be *reserved* and withheld *only* if the legislature has not acted by March 31, 1979.

The State is in no position to complain as to the 1979 funds, since the penalty has been rescinded. If reapportionment of the 1978 funds was authorized by the Act, as discussed, supra, it is difficult to see why the 1979 provision is at all relevant here. The Secretary indicated that a conditional order would provide a strong

incentive for the State to comply. As noted above, a public interest suspension under § 131(b) requires an affirmative finding that the suspension would be in the public interest. The Secretary explicitly made such a finding concerning the fiscal 1979 funds. It is reasoned in his final determination that a conditional reservation of these funds would induce compliance, and that inducing compliance is the purpose Congress had in mind when it gave the Secretary the power to suspend the penalty in the public interest. In light of the conclusion that only the possibility of inducing compliance would justify a § 131(b) suspension of the penalty, the Secretary's order is susceptible of only one interpretation—that he found as a matter of fact, and pursuant to his discretion, that South Dakota would be more likely to pass complying legislation if the fiscal 1978 funds were withheld and reapportioned rather than merely suspended or reserved. Thus, the Secretary's reason for exercise of the discretion granted by the Act may reasonably be discerned, *Bowman Transportation v. Arkansas Best Freight System, supra.*

CONCLUSION

It is plain from the above discussion that the record contains ample evidence to sustain the Secretary's determination. Considering all the evidence on the record, even including that which might be opposed to the Secretary's decision, it is held that the record fairly supports the Secretary's determination. In addition, it is held that the decision was based upon relevant factors and did not involve a clear error of judgment. The determination must, therefore, be affirmed. *Bowman Transportation v. Arkansas Best Freight System, supra*, at 284-8.

The State's Motion for Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted, and an order to this effect will be entered accordingly.

Dated this 7th day of April, 1980.

BY THE COURT:

s/Donald J. Porter
UNITED STATES DISTRICT JUDGE

APPENDIX D
District Court Judgment (#78-3051)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA, Plaintiff vs BROCK ADAMS, UNITED STATES SECRETARY OF TRANSPORTATION; KARL BOWERS, FEDERAL HIGHWAY ADMINISTRATOR; WILLIAM A. WESEMAN, DIVISION HIGHWAY ADMINISTRATOR and THE UNITED STATES OF AMERICA, Defendants.	)	CIV. 78-3051 ORDER AND JUDGMENT

The court having considered the administrative record in the above entitled case, all papers on file, and the briefs and oral arguments of the parties, and good cause appearing, now it is therefore

ORDERED that defendants' motion for summary judgment in the above entitled case be, and hereby is, in all things GRANTED, and it is further

ORDERED that plaintiffs' motions for summary

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judgment, for a declaratory judgment and for preliminary and permanent injunctive relief be, and hereby are, in all things DENIED,

All in accordance with the court's memorandum opinion of April 7, 1980, in the above entitled case, and further in accordance with this court's memorandum opinion in Civil Case No. 77-3039, insofar as the memorandum opinion in 77-3039 is applicable to the issues raised in this case.

Dated this 9th day of April, 1980.

BY THE COURT:

s/Donald J. Porter
U.S. DISTRICT JUDGE

ATTEST:

WILLIAM J. SRSTKA, CLERK
BY: s/Judy L. Harvey
Deputy

(SEAL OF COURT)

APPENDIX E
8th Circuit Opinion

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1358 and 80-1359

State of South Dakota,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Neil Goldschmidt, United States Secretary of Transportation; John Hassell, Jr., Federal High-Administrator; Marvin Espeland, Division Highway Administrator, and The United States of America,	*	Appeals from the United States District Court for the District of South Dakota.
	*	
	*	
	*	
	*	
	*	
	*	
Appellees.	*	

Submitted: December 8, 1980
Filed: December 12, 1980

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

PER CURIAM.

The State of South Dakota (the State) appeals two adverse decisions of the district court which held that the Highway Beautification Act, 23 U.S.C. § 131 (1965) (the Act) is constitutional[1] and that the Secretary of Transportation was authorized by the Act to withhold ten percent of the State's apportionment of 1978 federal highway funds as a penalty for the State's failure to institute effective control of billboards.[2] We affirm based on the comprehensive opinions of the district court, however, we review the history of the litigation leading to these appeals for purposes of clarification.

Beginning in 1971, then Secretary of Transportation Volpe notified the State that its zoning of areas adjacent to interstate and primary roads did not comply with the Act. The Secretary assessed a ten percent penalty pursuant to 23 U.S.C. § 104, but then suspended the penalty to provide the State with time to comply. The State unsuccessfully challenged the ten percent penalty in district court, *South Dakota v. Volpe*, 353 F.Supp. 335 (D.S.D. 1973).

Later in 1973, the state legislature passed legislation which complied with the Act and the Secretary returned the ten percent penalty. The new legislation provided the State Board of Transportation with the authority to alter state law. This authority was used in reaching an agreement between the State Board of Transportation and the Federal Highway Administrator which conformed to the Act. The agreement, however, was subsequently invalidated by the South

[1] *South Dakota v. Adams*, Civil No. 77-3039, mem. op. (D.S.D. April 9, 1980).

[2] *South Dakota v. Adams*, Civil No. 78-3051, mem. op. (D.S.D. April 9, 1980).

Dakota Supreme Court because the 1973 legislation improperly delegated legislative authority to the State Board of Transportation. *Hogen v. State Board of Transportation*, 245 N.W.2d 493 (1976).

In April 1977, the state legislature passed new legislation. The governor signed the legislation even though the State had been informed that the Federal Highway Administrator objected to the bill, and its enactment could lead to another ten percent penalty. On July 11, 1977, the Secretary notified the State of his preliminary decision that the new legislation did not comply with the Act and that ten percent of the State's 1978 apportionment of funds and those for succeeding years would be reserved pending a final determination. The State requested and received a bill of particulars and an administrative hearing regarding the nonconforming legislation. The administrative hearing was held on December 12-15, 1977, and the federal government was represented by the Federal Highway Administration. Prior to the issuance of the decision of the Administrative Law Judge, the State filed two actions in federal district court. The first action challenged the legality of the Secretary's reservation of the funds before rendering a final determination. The district court held that the Secretary had authority to reserve the funds and this court affirmed. *South Dakota v. Adams*, 587 F.2d 915 (8th Cir. 1978), *cert. denied*, 441 U.S. 961 (1979). In the other action, the State unsuccessfully challenged the constitutionality of the Highway Beautification Act and the district court's decision in that action is the subject of the current appeal in No. 80-1358.

The second appeal before this court, No. 80-1359, alleges that the district court erred in affirming the Secretary's order and final determination that withheld ten percent of the State's 1978 apportionment of

federal highway funds. The Secretary's final order was issued November 9, 1978, and it withheld $4,085,599 in funds. Although the Administrative Law Judge in March 1978 had found the State had made a good faith effort to comply with the Act, the Secretary reviewed the record de novo and concluded that the 1978 funds previously reserved should be permanently withheld and reapportioned to other states. The Secretary also determined that 1979 funds should not be reapportioned unless the State failed to enact billboard control laws which complied with the Act by March 31, 1979. The state legislature, as noted by the district court, has enacted such legislation and most of the 1979 funds have been released to the State.

We have carefully studied the record in these cases, including the district court's opinions, the briefs and the arguments of the parties. We find no merit to the State's arguments, and accordingly affirm on the basis of Judge Porter's detailed and well reasoned opinions pursuant to Rule 14 of the Rules of this court. *See also Nebraska v. Tiemann*, 510 F.2d 446 (8th Cir. 1975). All costs shall be taxed to the State.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F
8th Circuit Judgment

JUDGMENT

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 80-1358 & 80-1359 September Term, 1980

STATE OF SOUTH DAKOTA,

Appellant,

vs.

Neil Goldschmidt, etc., et al,

Appellees.

APPEAL FROM the United States District Court for the District of South Dakota.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of South Dakota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed on the basis of Judge Porter's detailed and well reasoned opinions pursuant to Rule 14 of the Rules of this Court.

It is further ordered that all costs shall be taxed to the State of South Dakota.

December 12, 1980

A true copy.

Attest:

Robert D. St Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit
January 21, 1981

APPENDIX G
8th Circuit Rehearing Order

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1358 and 80-1359		September Term, 1980
State of South Dakota, Appellant, vs. Neil Goldschmidt, United States Secretary of Transportation; John Hassell, Jr., Federal Highway Administrator; Marvin Espeland, Division Highway Administrator, and The United States of America, Appellees.	)	Appeal from the United States District Court for the District of South Dakota.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 2, 1981

APPENDIX H
23 USC 131

131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices, which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such

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time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or

natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way areas adjacent to the Interstate and primary systems which are zoned industrial or commerical under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commerical or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act [23 USCS §§ 131 and notes, 135 note, 136, 319]. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement; *Provided*, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be

considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or

in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254 [28 USCS § 1254]. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter [23 USCS §§ 101-144] relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the

just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the times of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act [Amendments] of 1974 [Jan 4, 1975], which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c) (1) and 131(f) to

develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

APPENDIX I
H.B. 786, 1977 (SDCL 31-29)

STATE OF SOUTH DAKOTA
OFFICE OF
THE SECRETARY OF STATE

Department of State

United States of America,
State of South Dakota,

SECRETARY'S-
OFFICE

This is to certify that the attached instrument of writing is a true, correct and examined copy of House Bill No. 786, as passed by the Fifty-second Session of the Legislature of the State of South Dakota, approved by the Governor on April 1, 1977, filed in this office on April 1, 1977; and the whole thereof, and has been carefully compared with the original now on file in this office and found correct.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota at the City of Pierre, the Capital, on this 6th day of April, 1977

s/Lorna B. Herseth
Secretary of State

(SEAL)

By s/Jean D. Johnson
Assistant Secretary of State

FEES $ $8.50

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An Act

ENTITLED, An Act to provide for the regulation and control of outdoor advertising, and to repeal SDCL 31-29-15 and 31-29-43 to 31-29-58, inclusive.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. The Legislature, recognizing the public investment in highways and in justification of these expenditures, particularly the cost of maintenance which is borne wholly by state funds, finds and declares that it is necessary to promulgate a public policy of planning and zoning adjacent to the interstate and primary systems within this state to promote their maximum utilization by encouraging the development of roadside businesses to serve the needs and pleasures of the traveling public, as well as to stimulate tourism, commerce, and for purposes of promoting the general growth of the state's economy. It is the intention of the Legislature by this Act to provide a statutory basis for the regulation of outdoor advertising. In that regard, the reasonable regulation and control of outdoor advertising adjacent to the interstate and primary highway systems of this state shall, as are other land use restrictions and controls, be accomplished by local control pursuant to title 11 of the South Dakota Codified Laws.

Section 2. Terms used in this Act, unless the context otherwise requires, mean:

(1) "Interstate system" that portion of the national system of interstate and defense highways located within this state, as officially designated, or as may hereafter be so designated, by the state department of transportation and approved by the United States secretary of transportation,

pursuant to the provisions of Title 23, United States Code;

(2) "Primary system" that portion of connected main highways, as officially designated, or as may hereafter be so designated, by the state department of transportation, and approved by the United States secretary of transportation, pursuant to the provisions of Title 23, United States Code;

(3) "Outdoor advertising" any outdoor sign, display, device, light, figure, drawing, painting, message, plaque, poster, or billboard, which is designed, intended or used to advertise or inform, any part of the advertising or information contents of which is visible from any place on the main-traveled way of the interstate or primary systems;

(4) "Safety rest area" an area or site established and maintained within or adjacent to the right of way by or under public supervision or control, for the convenience of the traveling public;

(5) "Information center" an area or site established and maintained at safety rest areas for the purpose of informing the public of places of interest within the state and providing such other information as the division of tourism development may consider desirable;

(6) "Department" the South Dakota state department of transportation.

(7) "Directional sign, display or device providing directional information about goods and services in the interest of the traveling public", any sign, display or device giving directional information pertaining to food services, lodging, gasoline and automotive services, resorts, attractions, camp-

grounds, truck stops, natural wonders, scenic and historical sites, and areas suited for outdoor recreation or businesses catering to the traveling public.

(8) "Would work a substantial economic hardship", tending to cause or causing a measurable negative economic effect, including a loss of business income, an increase in unemployment, a reduction in sales taxes to the state, a reduction in property taxes to the county, school district or municipality, and other such negative economic factors.

(9) "Specific or defined area", an economic area, including one or more businesses, which would suffer substantial economic hardship by the removal of any directional sign, display, or device, providing directional information about goods and services in the interest of the traveling public, which such sign, display or device may be situated outside of such specific or defined area.

Section 3. No outdoor advertising shall be erected within six hundred sixty feet of the nearest edge of the right of way and visible from the main-traveled way or beyond six hundred sixty feet of the nearest edge of the right of way visible from the main-traveled way, *located outside the corporate limits of a municipality* and erected with the purpose of its message being read from the main-traveled way of the interstate or primary systems except the following:

(1) Directional and official signs and notices, as authorized or required by law, which signs and notices may include, but shall not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions, *and directional in-*

formation concerning goods and services of businesses catering to the traveling public;

(2) Signs, displays and devices advertising the sale or lease of property upon which they are located;

(3) Signs, displays and devices advertising activities conducted on the property upon which they are located;

(4) Signs, displays and devices located in areas which are designated industrial or commercial by local authority as provided by title 11 of the South Dakota Codified Laws;

(5) Signs, displays and devices located in unzoned industrial or commercial areas as hereafter provided;

(6) Signs, including both official public, and private business signs, for which the board shall make a uniform charge, giving specific information in the interest of the traveling public located within the rights of way of the interstate and primary systems in areas at appropriate distances from interchanges or intersections on such systems, the location of which shall be determined by the department, any provision of chapter 31-28 or of this chapter to the contrary notwithstanding; and

(7) Signs lawfully in existence on October 22, 1965, determined by the board of transportation, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance, the preservation of which would be consistent with the purposes of this chapter.

(8) Warning signs placed by public utilities for the protection of underground utility cables.

Section 4. On interstate highways or limited access primary highways outside municipalities, no outdoor advertising device may be located adjacent to or within five hundred feet of an interchange, intersection at grade or safety rest area. Such five hundred feet shall be measured along such highway from the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.

Section 5. The standards and criteria for size, lighting and spacing of outdoor advertising authorized to be erected and maintained in zoned or unzoned commercial or industrial areas adjacent to the interstate and primary highway systems are:

(1) As to size:

(a) The maximum area of any one sign facing any one direction shall be twelve hundred square feet but which in no instance shall exceed thirty feet in height and sixty feet in length including border and trim, but not supports or apron;

(b) In case of double-faced, back-to-back and V-type signs, said size limitation shall apply to each face providing however that in no case shall the area exposed in any one direction be greater than provided in subsection (a) of this subdivision;

(2) As to lighting:

(a) No revolving or rotating beam of light simulating an official emergency device shall be permitted. Signs with flashing lights of any color shall not be permitted, except illuminating signs giving such public service information as time, date or temperature;

(b) External lighting, such as floodlights, thinline and gooseneck reflectors, shall be permitted, provided that it is shielded so as to prevent the direction of rays of light to any part of the main-traveled way; and

(c) No lighting shall be allowed which is of such brilliance or intensity so as to establish glare or reflection which would interfere with the effectiveness of any official traffic control device or official sign or interfere with the motorist's view of traffic conditions;

(3) As to spacing:

(a) Within municipalities, signs shall conform to any applicable building codes and ordinances relating to spacing except that no such sign shall be located closer than one hundred feet from an existing off-premises sign on a state nonlimited access primary highway and *no closer than three hundred feet from any existing off-premise sign on a limited access primary highway or on an interstate highway;*

(b) Outside of municipalities, no off-premise sign shall be erected adjacent to a limited primary access highway or interstate highway closer than five hundred feet, nor adjacent to a nonlimited access highway closer than three hundred feet, to an existing off-premise sign;

(c) Neither inside nor outside of municipalities shall any sign be erected or maintained in such a location as to prevent the driver of a vehicle from having an effective view of any official traffic control device applicable to him

or to approaching, intersecting or merging traffic and highways within five hundred feet of such sign; and,

(d) Double-faced, back-to-back and V-type signs shall be considered as a single sign structure for purposes of these usages.

Section 6. Whenever a bona fide local zoning authority recognized in title 11 has made a determination of customary use, concerning such size, lighting and spacing considerations, such determination shall be in lieu of controls in section 5 of this Act.

Section 7. An "unzoned commercial or industrial area," in consideration of the advertising needs of remote rural businesses located outside of municipal corporate limits, shall mean any of the following areas adjacent to an interstate or primary highway within this state:

(1) All land on the same side of the highway as, and *within one mile in either direction of*, any commercial or industrial activity other than outdoor advertising, measured from the boundaries of the land used or occupied by such activity, including its parking, storage and service areas, its driveways, and its established front, rear and side yards constituting an integral part of such activity, except land within three hundred feet of a building used primarily as a residence without the consent of the owner thereof;

(2) All land on the other side of any such highway which is directly opposite from, and of the same dimensions as, any area defined under the preceding subdivision, to the extent that such land is appropriate for outdoor advertising;

(3) All land within one thousand feet of the nearest

edge of the right of way of any such highway, measured perpendicularly to such edge, to the extent that such land is traversed by a railroad right of way and is appropriate for outdoor advertising;

(4) All pockets of land lying between any commercial or industrial areas, whether so zoned or whether unzoned as defined in this section, which are not more than one thousand feet apart, to the extent that such land is appropriate for outdoor advertising; and

(5) In addition, after public hearing, all other unzoned lands, or zoned lands without regard to zoning classification, appropriate for outdoor advertising which are determined to be unzoned commercial or industrial areas by any board of county commissioners, which board shall notify the department of the date of any such determination and the location of the land so designated;

(6) The several boards of county commissioners shall determine the additional unzoned commercial or industrial areas as provided by subdivision (5), and may also redetermine unzoned commercial and industrial areas as defined by subdivisions (2), (3) and (4), to be non-commercial and non-industrial unzoned areas to the extent, after public hearing, that the same are not determined appropriate for outdoor advertising.

Section 8. Outdoor advertising shall be subject to personal property tax and shall not be subject to any permit, license or other special fee for either erection or maintenance or other purpose whatsoever.

Section 9. Nothing in this Act shall be construed to authorize any local authority to prohibit outdoor

advertising throughout its jurisdiction, but all such regulation and control shall be reasonable and reasonably related to the needs of the business community to adequately and properly advertise its goods and services of benefit to the traveling public.

Section 10. The department shall acquire by purchase, gift or condemnation, and shall pay just compensation upon the removal of signs, displays and devices made non-conforming by the terms of this Act, which and insofar as their removal is required by this Act, for all signs, displays and devices lawfully erected in this state. Any such removal, by whomever effected, shall be deemed a taking and appropriation by this state subject to just compensation. Full compensation, in all ways equitably computed and including severance damage and damage to the remainder of the owner's business or property rights and interests, shall be paid, for each such taking and appropriation. Despite any contrary provision in this Act, or otherwise in law, no outdoor advertising shall be required to be removed unless at the time of removal there are sufficient funds, from whatever source, appropriated and immediately available to the state with which to pay the just compensation required under this section, and unless at such time the federal funds required to be contributed to this state under 23 U.S.C. 131 have also been appropriated and are immediately available to this state. No such sign, display or device may be removed until such just compensation has been fully paid.

Section 11. Just compensation shall be paid under section 10 of this Act for the following:

(1) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest

in such sign, display, or device, and severance damages as provided by section 10; and

(2) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain signs, displays, and devices thereon; and

(3) The taking from the owners of real property on which the erection and maintenance of such signs, displays and devices are prohibited by this Act of the negative easement so imposed.

Section 12. Any person who owns two or more non-conforming signs, displays or devices within this state and, when and insofar as their removal is required by this Act, and their removal is sought by the state by condemnation, all such signs, displays and devices, unless the requirements of this section are waived in writing by their owner, shall in order to avoid duplicity of suits and incumbent costs and hardship to the state and the owner, be taken at the same time in a single condemnation proceeding instituted by the board and venued in the county of residence of the owner or, if the owner is not a resident of South Dakota, venued in Hughes County.

Section 13. No outdoor advertising sign, display or device may be removed by an amortization schedule, nor may its value be so determined, and the owners thereof and the owners of the real property on which the same are situated shall be guaranteed just compensation, including through condemnation procedures, as provided in this Act.

Section 14. A sign, display or device not required to be removed, or until the time of actual removal, may be used and may be repaired or replaced by a sign of

substantially the same kind either in the course of ordinary and customary maintenance, or for purposes of aesthetic enhancement, or if the same has been damaged or destroyed by act of God or vandalism or by reasons beyond the control of the owner thereof.

Section 15. The department shall promptly locate and define specific areas adjacent to the interstate and primary systems within this state in which there are signs, displays and devices which were lawfully erected and in existence on May 4, 1976, and which do not conform to 23 U.S.C. 131(c), and which signs, displays and devices provide directional information about goods and services in the interest of the traveling public and are such that their removal would work a substantial economic hardship in such defined area.

Section 16. The department shall proceed with dispatch to forcefully demonstrate to the United States secretary of transportation, that such signs, displays and devices are as described in this Act, and that their removal would in fact work such a substantial economic hardship in such defined area and, based upon such demonstration, shall urgently request the secretary to permit the retention in such areas of such signs, displays and devices, and shall use its best efforts to achieve approval of such requests by the United States secretary of transportation.

Section 17. The department shall conduct public hearings and utilize such information and cooperation supplied by or available from private businesses, private business organizations, chambers of commerce, other governmental agencies and departments, which such agencies and departments are hereby directed to cooperate in this regard, and any and all other appropriate sources of information and cooperation necessary or desirable to accomplish the terms of sections 15 and 16 of this Act.

Section 18. The state secretary of transportation shall promptly develop programs which will assure that the necessary directional information about facilities and businesses providing goods and services in the interest of the traveling public will continue to be available to motorists, especially tourists who are strangers to this state. In accomplishing the terms of this section, the department shall study 23 U.S.C. 131, and particularly subsections 131(c) and 131(f) thereof, and make recommendations for programs thereunder which will permit the development of signs which are functional and aesthetically compatible with their surroundings. The state secretary of transportation shall forthwith transmit such information to the United States secretary of transportation or his designee and fully cooperate with the United States secretary of transportation in implementing subsection 131(q) (1). The department shall, in conjunction with the private sector through public hearings, also study means of utilizing and encouraging limited roadside commercial zoning under subsection 131(d), and take all possible steps to implement such means, including recommendations in this regard to the next legislative session.

Section 19. Upon petition, declaration or resolution from any state, county or municipal agency, or from any industry association or any group of private business persons or their employees, which provides information that the removal of such directional signs, displays or devices would work a substantial economic hardship in specific or defined areas, the state department of transportation shall seek approval from the United States secretary of transportation to permit retention of such directional signs, displays and devices lawfully erected under state law in force at the time of their erection which do not conform to the requirements of the present state laws, and where such

signs, displays and devices were in existence on May 5, 1976.

Section 20. The department shall promptly, and prior to the removal of any signs, displays or devices, adopt a program to assure that the removal of signs, displays and devices providing necessary directional information, and which were providing directional information on June 1, 1972, about facilities and services in the interest of the traveling public, shall be deferred until all other nonconforming signs are removed, and such directional signs shall be the last to be removed.

Section 21. Nothing in this Act shall be construed to authorize the state or any political subdivision to operate or maintain, directly or indirectly, any commercial activity in any safety rest area or information center.

Section 22. That §§ 31-29-15 and 31-29-43 to 31-29-58 inclusive, be repealed.

Chapter No. _____

File No. 395

I hereby certify that the within Act originated in the House as House Bill No. 786

s/Paul Inman

Chief Clerk.

Received at this Executive Office this 18th day of March, 1977 at 8:24 p.m.

R.F. Kneip

Governor.

by JGS

STATE OF SOUTH DAKOTA, } ss.
Office of Secretary of State }

Filed Apr. 1, 1977 at 4:45 o'clock P.M.

s/Lorna B. Herseth

Secretary of State.

By _____
Asst. Sec'y of State.

An Act ENTITLED. An Act to provide for the regulation and control of outdoor advertising, and to repeal SDCL 31-29-15 and 31-29-43 to 31-29-58, inclusive.

s/Lowell Hansen, Jr.
Speaker of the House.

Attest:

Paul Inman
Chief Clerk.

Harvey Wollman
President of the Senate.

Attest:

Joyce Hazeltine
Secretary of the Senate.

Approved this 1st day of April, A. D., 1977

R.F. Kneip
Governor.

APPENDIX J
U.S. Constitution Provisions

Article 1, Section 8

§8. The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

To borrow money on the credit of the United States.

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

To provide for the punishment of counterfeiting the securities and current coin of the United States.

To establish post offices and post roads.

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respecitve writings and discoveries.

To constitute tribunals inferior to the Supreme Court.

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

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To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

To provide and maintain a navy.

To make rules for the government and regulation of the land and naval forces.

To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the state respectively the appointment of the officers and the authority of training the militia, according to the discipline prescribed by Congress.

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

TENTH AMENDMENT

Article 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

APPENDIX K
US/DOT Penalty Letter

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

July 11, 1977

Honorable Richard F. Kneip
Governor of South Dakota
Pierre, South Dakota 57501

Dear Governor Kneip:

The Highway Beautification Act of 1965, 23 U.S.C. 131, requires the States to effectively control outdoor advertising adjacent to Interstate and Federal-aid primary highways. Any State not providing for effective control as required by the Act is subject to a reduction of 10 percent of its Federal-aid highway apportionment, 23 U.S.C. 131(b).

On September 15, 1976, the Supreme Court of South Dakota ruled that the State's outdoor advertising control law was unconstitutional, *Hogan v. State Board of Transportation*, 245 N.W.2d 493. This decision was based in part on a finding that the authority given the State Board of Transportation to enter into the State/Federal agreement required by 23 U.S.C. 131(d) was an unconstitutional delegation of legislative authority. The effect of this decision was to void both the State control law and the State/Federal agreement.

On January 11, 1977, you were notified by the Federal Highway Administrator that the State was out of compliance with 23 U.S.C. 131. He advised you

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that prompt legislative action to reestablish effective control would be required to avoid a reduction in the State's Federal-aid highway apportionment.

On March 8, 1977, I sent you a telegram again setting forth the requirements of the Federal law and advising you of the consequences of continued inaction. *Your March 24, 1977, response to my telegram indicated that the South Dakota Legislature had passed two bills, H.B. 786 and H.B. 927, that were on your desk for consideration. These bills were reviewed by the Department of Transportation prior to their passage by the Legislature. Neither met the minimum requirements of 23 U.S.C. 131. You signed these bills into law on April 1, 1977.*

I have concluded that South Dakota is not providing for the effective control of outdoor advertising. Pursuant to the provisions of 23 U.S.C. 131(b), 10 percent of your next Federal-aid highway apportionment will be reserved.

A final determination as to the permanent withholding of funds will be made not less than 60 days from receipt of this letter, unless the State requires a hearing within that period of time. You may direct your request for a hearing to me, and I assure you that it will be given prompt attention. As set forth at 23 U.S.C. 131(L), South Dakota will be entitled to appeal a final written order withholding funds to any U.S. District Court in the State.

The Department's reason for this proposed withholding of 10 percent of South Dakota's apportionment is as follows:

1. The State of South Dakota has not made provisions for the effective control of outdoor advertising in accordance with 23 U.S.C. 131.

2. The State/Federal agreement, as required by 23 U.S.C. 131(d), has been voided by judicial action in *Hogan* v. *State Board of Transportation* (S.D. 1976), and no provision for an adequate new agreement has been made.

I urge that prompt action be taken in your State for the correction of deficiencies in the current State law and the provisions of an adequate State/Federal agreement so that you may show cause why the proposed action required by 23 U.S.C. 131(b) should not be made final.

Sincerely,
s/Brock Adams

APPENDIX L
23 CFR *Highways*, Part 750

PART 750—HIGHWAY BEAUTIFICATION

~~Subpart A—National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1956 Bonus Program.~~

Subpart B—National Standards for Directional and Official Signs

750.151 Purposes.
750.152 Application.
750.153 Definitions.
750.154 Standards for directional signs.
750.155 State standards.

Subpart C [Reserved]

Subpart D—Outdoor Advertising (Acquisition of Rights of Sign and Sign Site Owners)

750.301 Purpose.
750.302 Policy.
750.303 Definitions.
750.304 State policies and procedures.
750.305 Federal participation.
750.306 Documentation for Federal participation.
750.307 FHWA project approval.
750.308 Reports.

Subpart E—Signs Exempt From Removal in Defined Areas

Sec.
750.501 Purpose.
750.502 Applicability.
750.503 Exemptions.

Subpart F [Reserved]
Subpart G—Outdoor Advertising Control

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750.701 Purpose.
750.702 Applicability.
750.703 Definitions.
750.704 Statutory requirements.
750.705 Effective control.
750.706 Sign control in zoned and unzoned commercial and industrial areas.
750.707 Nonconforming signs.
750.708 Acceptance of state zoning.
750.709 On-property or on-premise advertising.
750.710 Landmark signs.
750.711 Structures which have never displayed advertising material.
750.712 Reclassification of signs.
750.713 Bonus provisions.
Subpart B—National Standards for Directional and Official Signs

Authority: 23 U.S.C. 131, 315, 49 U.S.C. 1651; delegation of authority in 49 CFR 1.48(b).

§ 750.151 Purpose.

(a) In section 131 of title 23, United States Code, Congress has declared that:

(1) The erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote safety and recreational value of public travel, and to preserve natural beauty.

(2) Directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, shall conform to national standards authorized to be promulgated by the Secretary, which standards shall contain provisions concerning the

lighting, size, number and spacing of signs, and such other requirements as may be appropriate to implement the section.

(b) The standards in this part are issued as provided in section 131 of title 23, United States Code.

[38 FR 16044, June 30, 1973 as amended at 40 FR 21934, May 20, 1975]

§ 750.152 Application.

The following standards apply to directional and official signs and notices located within six hundred and sixty (660) feet of the right-of-way of the Interstate and Federal-aid primary systems and to those located beyond six hundred and sixty (660) feet of the right-of-way of such systems, outside of urban areas, visible from the main traveled way of such systems and erected with the purpose of their message being read from such main traveled way. These standards do not apply to directional and official signs erected on the highway right-of-way.

[40 FR 21934, May 20, 1975]

§ 750.153 Definitions.

For the purpose of this part—

(a) Sign means an outdoor sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main traveled way of the Interstate or Federal-aid primary highway.

(b) Main traveled way means the through traffic lanes of the highway, exclusive of frontage roads, auxiliary lanes, and ramps.

(c) Interstate System means the National System of

Interstate and Defense Highways described in section 103(d) of title 23, United States Code.

(d) Primary system means the Federal-aid highway system described in section 103(b) of title 23, United States Code.

(e) Erect means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish.

(f) Maintain means to allow to exist.

(g) Scenic area means any area of particular scenic beauty or historical significance as determined by the Federal, State, or local officials having jurisdiction thereof, and includes interests in land which have been acquired for the restoration, preservation, and enhancement of scenic beauty.

(h) Parkland means any publicly owned land which is designated or used as a public park, recreation area, wildlife or waterfowl refuge or historic site.

(i) Federal or State law means a Federal or State constitutional provision or statute, or an ordinance, rule, or regulation enacted or adopted by a State or Federal agency or a political subdivision of a State pursuant to a Federal or State constitution or statute.

(j) Visible means capable of being seen (whether or not legible) without visual aid by a person of normal visual acuity.

(k) Freeway means a divided arterial highway for through traffic with full control of access.

(l) Rest area means an area or site established and maintained within or adjacent to the highway right-of-way by or under public supervision or control for the convenience of the traveling public.

(m) Directional and official signs and notices includes only official signs and notices, public utility signs, ser-

vice club and religious notices, public service signs, and directional signs.

(n) Official signs and notices means signs and notices erected and maintained by public officers or public agencies within their territorial or zoning jurisdiction and pursuant to and in accordance with direction or authorization contained in Federal, State, or local law for the purposes of carrying out an official duty or responsibility. Historical markers authorized by State law and erected by State or local government agencies or nonprofit historical societies may be considered official signs.

(o) Public utility signs means warning signs, informational signs, notices, or markers which are customarily erected and maintained by publicly or privately owned public utilities, as essential to their operations.

(p) Service club and religious notices means signs and notices, whose erection is authorized by law, relating to meetings of nonprofit service clubs or charitable associations, or religious services, which signs do not exceed 8 square feet in area.

(q) Public service signs means signs located on school bus stop shelters, which signs—

(1) Identify the donor, sponsor, or contributor of said shelters;

(2) Contain public service messages, which shall occupy not less than 50 percent of the area of the sign;

(3) Contain no other message;

(4) Are located on schoolbus shelters which are authorized or approved by city, county, or State law, regulation, or ordinance, and at places approved by the city, county, or State agency controlling the highway involved; and

(5) May not exceed 32 square feet in area. Not more than one sign on each shelter shall face in any one direction.

(r) Directional signs means signs containing directional information about public places owned or operated by Federal, State, or local governments or their agencies; publicly or privately owned natural phenomena, historic, cultural, scientific, educational, and religious sites; and areas of natural scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public.

(s) State means any one of the 50 States, the District of Columbia, or Puerto Rico.

(t) Urban area means an urbanized area or, in the case of an urbanized area encompassing more than one State, that part of the urbanized areas in each such State, or an urban place as designated by the Bureau of the Census having a population of five thousand or more and not within any urbanized area, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall, as a minimum, encompass the entire urban place designated by the Bureau of the Census.

[38 FR 16044, June 30, 1973, as amended at 40 FR 21934, May 20, 1975]

§ 750.154 Standards for directional signs.

The following apply only to directional signs:

(a) *General.* The following signs are prohibited:

(1) Signs advertising activities that are illegal under Federal or State laws or regulations in effect at the location of those signs or at the location of those activities.

(2) Signs located in such a manner as to obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, or obstruct or interfere with the driver's view of approaching, merging. or intersecting traffic.

(3) Signs which are erected or maintained upon trees or painted or drawn upon rocks or other natural features.

(4) Obsolete signs.

(5) Signs which are structurally unsafe or in disrepair.

(6) Signs which move or have any animated or moving parts.

(7) Signs located in rest areas, parklands or scenic areas.

(b) *Size*. (1) No sign shall exceed the following limits:

(i) Maximum area—150 square feet.

(ii) Maximum height—20 feet.

(iii) Maximum length—20 feet.

(2) All dimensions include border and trim, but exclude supports.

(c) *Lighting*. Signs may be illuminated subject to the following:

(1) Signs which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights are prohibited.

(2) Signs which are not effectively shielded so as to prevent beams or rays of light from being directed at any portion of the traveled way of an Interstate or primary highway or which are of such intensity or brilliance as to cause glare or to impair the vision of

the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle are prohibited.

(3) No sign may be so illuminated as to interfere with the effectiveness of or obscure an official traffic sign, device, or signal.

(d) *Spacing.* (1) Each location of a directional sign must be approved by the State highway department.

(2) No directional sign may be located within 2,000 feet of an interchange, or intersection at grade along the Interstate System or other freeways (measured along the Interstate or freeway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way).

(3) No directional sign may be located within 2,000 feet of a rest area, parkland, or scenic area.

(4) (i) No two directional signs facing the same direction of travel shall be spaced less than 1 mile apart;

(ii) Not more than three directional signs pertaining to the same activity and facing the same direction of travel may be erected along a single route approaching the activity;

(iii) Signs located adjacent to the Interstate System shall be within 75 air miles of the activity; and

(iv) Signs located adjacent to the primary system shall be within 50 miles of the activity.

(e) *Message content.* The message on directional signs shall be limited to the identification of the attraction or activity and directional information useful to the traveler in locating the attraction, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, and pictorial or photographic representations of the activity or its environs are prohibited.

(f) *Selection method and criteria.* (1) Privately owned activities or attractions eligible for directional signing are limited to the following: natural phenomena; scenic attractions; historic, educational, cultural, scientific, and religious sites; and outdoor recreational areas.

(2) To be eligible, privately owned attractions or activities must be nationally or regionally known, and of outstanding interest to the traveling public.

(3) Each State shall develop specific selection methods and criteria to be used in determining whether or not an activity qualifies for this type of signing. A statement as to selection methods and criteria shall be furnished to the Secretary of Transportation before the State permits the erection of any such signs under section 131(c) of title 23, United States Code, and this part.

§ 750.155 State standards.

This part does not prohibit a State from establishing and maintaining standards which are more restrictive with respect to directional and official signs and notices along the Federal-aid highway systems than these national standards.

[38 FR 16044, June 20, 1973, as amended at 40 FR 21934, May 20, 1975]

Subpart C [Reserved]

Subpart D—Outdoor Advertising (Acquisition of Rights of Sign and Sign Site Owners)

Authority: 23 U.S.C. 131 and 315; 23 CFR 1.32 and 1.48 (b).

Source: 39 FR 27436, July 29, 1974, unless otherwise noted.

§ 750.301 Purpose.

To prescribe the Federal Highway Administration (FHWA) policies relating to Federal participation in the costs of acquiring the property interests necessary for removal of nonconforming advertising signs, displays and devices on the Federal-aid Primary and Interstate Systems, including toll sections on such systems, regardless of whether Federal funds participated in the construction thereof. This regulation should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g).

§ 750.302 Policy.

(a) Just compensation shall be paid for the rights and interests of the sign and site owner in those outdoor advertising signs, displays, or devices which are lawfully existing under State law, in conformance with the terms of 23 U.S.C. 131.

(b) (1) Federal reimbursement will be made on the basis of 75 percent of the acquisition, removal and incidental costs legally incurred or obligated by the State.

(2) Federal funds will participate in 100 percent of the costs of removal of those signs which were removed prior to January 4, 1975, by relocation, pursuant to the provisions of 23 CFR § 750.305 (a) (2), and which are required to be removed as a result of the amendments made to 23 U.S.C. § 131 by the Federal Aid Highway Amendments of 1974, P.L. 93-643, § 109, January 4, 1975. Such signs must have been relocated to a legal site, must have been legally maintained since the relocation, and must not have been substantially changed, as defined by the State maintenance standards, issued pursuant to 23 CFR § 750.707 (b).

(c) Title III of the Uniform Relocation Assistance and

Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4651, et. seq.) applies except where complete conformity would defeat the purposes set forth in 42 U.S.C. 4651, would impede the expeditious implementation of the sign removal program or would increase administrative costs out of proportion to the cost of the interests being acquired or extinguished.

(d) Projects for the removal of outdoor advertising signs including hardship acquisitions should be programed and authorized in accordance with normal procedures for right-of-way projects.

[39 FR 27436, July 29, 1974; 39 FR 30349, Aug. 22, 1974, as amended at 41 FR 31198, July 27, 1976]

§ 750.303 Definitions.

(a) *Sign.* An outdoor sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the Interstate or Primary Systems, whether the same be permanent or portable installation.

(b) *Lease.* (license, permit, agreement, contract or easement). An agreement, oral or in writing, by which possession or use of land or interests therein is given by the owner or other person to another person for a specified purpose.

(c) *Leasehold value.* The leasehold value is the present worth of the difference between the contractual rent and the current market rent at the time of the appraisal.

(d) *Illegal sign.* One which was erected and/or maintained in violation of State law.

(e) *Nonconforming sign.* One which was lawfully erected, but which does not comply with the provisions of State law or State regulations passed at a later date or which later fails to comply with State law or State regulations due to changed conditions. Illegally erected or maintained signs are not nonconforming signs.

(f) *1966 Inventory.* The record of the survey of advertising signs and junk-yards compiled by the State highway department.

(g) *Abandoned sign.* One in which no one has an interest, or as defined by State law.

§750.304 State policies and procedures.

The State's written policies and operating procedures for implementing its sign removal program under State law and complying with 23 U.S.C. 131 and its proposed time schedule for sign removal and procedure for reporting its accomplishments shall be submitted to the FHWA for approval within 90 days of the date of this regulation. This statement should be supported by the State's regulations implementing its program. Revisions to the State's policies and procedures shall be submitted to the FHWA for approval. The statement should contain provisions for the review of its policies and procedure to meet changing conditions, adoption of improved procedures, and for internal review to assure compliance. The statement shall include as a minimum the following:

(a) *Project priorities.* The following order of priorities is recommended.

(1) Illegal and abandoned signs.

(2) Hardship situations.

(3) Nominal value signs.

(4) Signs in areas which have been designated as scenic under authority of State law.

(5) Product advertising on:

(i) Rural Interstate highway.

(ii) Rural primary highway.

(iii) Urban areas.

(6) Nontourist-oriented directional advertising.

(7) Tourist-oriented directional advertising.

(b) *Programming.* (1) A sign removal project may consist of any group of proposed sign removals. The signs may be those belonging to one company on those located along a single route, all of the signs in a single county or other locality, hardship situations, individually or grouped, such as those involving vandalized signs, or all of a sign owner's signs in a given State or area, or any similar grouping.

(2) A project for sign removal on other than a Federal-aid primary route basis e.g., a countywide project or a project involving only signs owned by one company, should be identified as CAF-000B( ), continuing the numbering sequence which began with the sign inventory project in 1966.

(3) Where it would not interfere with the State's operations, the State should program sign removal projects to minimize disruption of business.

(c) *Valuation and review methods.*

(1) *Schedules*—formulas. Schedules, formulas and other methods to simplify valuation of signs and sites are recommended for the purpose of minimizing administrative and legal expenses necessarily involved in determining just compensation by individual appraisals and litigation. They do not purport to be a

basis for the determination of just compensation under eminent domain.

(2) *Appraisals.* Where appropriate, the State may use its approved appraisal report forms including those for abbreviated or short form appraisals. Where a sign or site owner does not accept the amount computed under an approved schedule, formula, or other simplified method, an appraisal shall be utilized.

(3) *Leaseholds.* When outdoor advertising signs and sign sites involve a leasehold value, the State's procedures should provide for determining value in the same manner as any other real estate leasehold that has value to the lessee.

(4) *Severance Damages.* The State has the responsibility of justifying the recognition of severance damages pursuant to 23 CFR 710.24, and the law of the State before Federal participation will be allowed. Generally, Federal participation will not be allowed in the payment of severance damages to remaining signs, or other property of a sign company alleged to be due to the taking of certain of the company's signs. Unity of use of the separate properties, as required by applicable principles of eminent domain law, must be shown to exist before participation in severence damages will be allowed. Moreover, the value of the remaining signs or other real property must be diminished by virtue of the taking of such signs. Payments for severence damages to economic plants or loss of business profits are not compensable. Severance damage cases must be submitted to the FHWA for prior concurrence, to gether with complete legal and appraisal justification for payment of these damages. To assist the FHWA in its evaluation, the following data will accompany any submission regarding severance:

(i) One copy of each appraisal in which this was

analyzed. One copy of the State's review appraiser analysis and determination of market value.

(ii) A plan or map showing the location of each sign.

(iii) An opinion by the State highway department's chief legal officer that severance is appropriate in accordance with State law together with a legal opinion that, in the instant case, the damages constitute severance as opposed to consequential damage as a matter of law. The opinion shall include a determination, and the basis therefor, that the specific taking of some of an outdoor advertiser's signs constitutes a distinct economic unit, and that unity of use of the separate properties in conformity with applicable principles of eminent domain law had been satisfactority established. A legal memorandum must be furnished citing and discussing cases and other authorities supporting the State's position.

(5) *Review of value estimates.* All estimates of value shall be reviewed by a person other than the one who made the estimate. Appraisal reports shall be reviewed and approved prior to initiation of negotiations. All other estimates shall be reviewed before the agreement becomes final.

(d) *Nominal value plan.* (1) This plan may provide for the removal costs of eligible nominal value signs and for payments up to $250 for each nonconforming sign, and up to $100 for each nonconforming sign site.

(2) The State's procedures may provide for negotiations for sign sites and sign removals to be accomplished simultaneously without prior review.

(3) Releases or agreements executed by the sign and/or site owner should include the identification of the sign, statement of ownership, price to be paid, interest acquired, and removal rights.

(4) It is not expected that salvage value will be a consideration in most acquisitions; however, the State's procedures may provide that the sign may be turned over to the sign owner, site owner, contractor, or individual as all or part of the consideration for its removal, without any project credits.

(5) Programming and authorizations will be in accord with § 750.308 of this regulation. A detailed estimate of value of each individual sign is not necessary. The project may be programed and authorized as one project.

(e) *Sign removal.* The State's procedural statement should include provision for:

(1) Owner retention.

(2) Salvage value.

(3) State removal.

§ 750.305 Federal participation.

(a) Federal funds may participate in:

(1) Payments made to a sign owner for his right, title and interest in a sign, and where applicable, his leasehold value in a sign site, and to a site owner for his right and interest in a site, which is his right to erect and maintain the existing nonconforming sign on such site.

(2) The cost of relocating a sign to the extent of the cost to acquire the sign, less salvage value if any.

(3) A duplicate payment for the site owner's interest of $2,500 or less because of a bona fide error in ownership, provided the State has followed its title search procedures as set forth in its policy and procedure submission.

(4) The cost of removal of signs, partially completed

sign structures, supporting poles, abandoned signs and those which are illegal under State law within the controlled areas, provided such costs are incurred in accordance with State law. Removal may be by State personnel on a force account basis or by contract. Documentation for Federal participation in such removal projects should be in accord with the State's normal force account and contractural reimbursement procedures. The State should maintain a record of the number of signs removed. These data should be retained in project records and reported on the periodic report required under § 750.308 of this regulation.

(5) Signs materially damaged by vandals. Federal funds shall be limited to the Federal pro-rata share of the fair market value of the sign immediately before the vandalism occurred minus the estimated cost of repairing and reerecting the sign. If the State chooses, it may use its FHWA approved nominal value plan procedure to acquire these signs.

(6) The cost of acquiring and removing completed sign structures which have been blank or painted out beyond the period of time established by the State for normal maintenance and change of message, provided the sign owner can establish that his nonconforming use was not abandoned or discontinued, and provided such costs are incurred in accordance with State law, or regulation. The evidence considered by the State as acceptable for establishing or showing that the nonconforming use has not been abandoned or voluntarily discontinued shall be set forth in the State's policy and procedures.

(7) In the event a sign was omitted in the 1966 inventory, and the State supports a determination that the sign was in existence prior to October 22, 1965, the costs are eligible for Federal participation.

(b) Federal funds may not participate in:

(1) Cost of title certificates, title insurance, title opinion or similar evidence or proof of title in connection with the acquisition of a landowner's right to erect and maintain a sign or signs when the amount of payment to the landowner for his interest is $2,500 or less, unless required by State law. However, Federal funds may participate in the costs of securing some lesser evidence or proof of title such as searches and investigations by State highway department personnel to the extent necessary to determine ownership, affidavit of ownership by the owner, bill of sale, etc. The State's procedure for determining evidence of title should be set forth in the State's policy and procedure submission.

(2) Payments to a sign owner where the sign was erected without permission of the property owner unless the sign owner can establish his legal right to erect and maintain the sign. However, such signs may be removed by State personnel on a force account basis or by contract with Federal participation except where the sign owner reimburses the State for removal.

(3) Acquisition costs paid for abandoned or illegal signs, potential sign sites, or signs which were built during a period of time which makes them ineligible for compensation under 23 U.S.C. 131, or for rights in sites on which signs have been abandoned or illegally erected by a sign owner.

(4) The acquisition cost of supporting poles or partially completed sign structures in nonconforming areas which do not have advertising or informative content thereon unless the owner can show to the State's satisfaction he has not abandoned the structure. When the State has determined he sign structure has not been abandoned, Federal funds will participate in the acquisition of the structure, provided the costs are incurred in accordance with State law.

§ 750.306 Documentation for Federal participation.

The following information concerning each sign must be available in the State's files to be eligible for Federal participation.

(a) *Payment to sign owner.* (1) A photograph of the sign in place. Exceptions may be made in cases where in one transaction the State has acquired a number of a company's nominal value signs similar in size, condition and shape. In such cases, only a sample of representative photographs need be provided to document the type and condition of the signs.

(2) Evidence showing the sign was nonconforming as of the date of taking.

(3) Value documentation and proof of obligation of funds.

(4) Satisfactory indication of ownership of the sign and compensable interest therein (e.g., lease or other agreement with the property owner, or an affidavit, certification, or other such evidence of ownership).

(5) Evidence that the sign falls within one of the three categories shown in § 750.302 of this regulation. The specific category should be identified.

(6) Evidence that the right, title, or interest pertaining to the sign has passed to the State, or that the sign has been removed.

(b) *Payment to the site owner.*(1) Evidence that an agreement has been reached between the State and owner.

(2) Value documentation and proof of obligation of funds.

(3) Satisfactory indication of ownership or compensable interest.

(c) In those cases where Federal funds participate in 100 percent of the cost of removal, the State file shall contain the records of the relocation made prior to January 4, 1975.

[30 FR 27436, July 29, 1974, as amended at 41 FR 31198, July 27, 1976]

§ 750.307 FHWA project approval.

Authorization to proceed with acquisitions on a sign removal project shall not be issued until such time as the State has submitted to FHWA the following:

(a) A general description of the project.

(b) The total number of signs to be acquired.

(c) The total estimated cost of the sign removal project, including a break-down of incidental, acquisition and removal costs.

§ 750.308 Reports.

Periodic reports on site acquisitions and actual sign removals shall be submitted on FHWA Form 1424 and as prescribed.[1]

[39 FR 27436, July 29, 1974, as amended at 41 FR 9321, Mar. 4, 1976]

Subpart E—Signs Exempt from Removal in Defined Areas

Authority: 23 U.S.C. 131 and 315, 49 CFR 1.48, 23 CFR 1.32.

Source: 41 FR 45827, Oct. 18, 1976, unless otherwise noted.

§ 750.501 Purpose.

This subpart sets forth the procedures pursuant to which a State may, if it desires, seek an exemption

[1] Forms are available at FHWA Division offices located in each state.

from the acquisition requirements of 23 U.S.C. 131 for signs giving directional information about goods and services in the interest of the traveling public in defined areas which would suffer substantial economic hardship if such signs were removed. This exemption may be granted pursuant to the provisions of 23 U.S.C. 131(o).

§ 750.502 Applicability.

The provisions of this subpart apply to signs adjacent to the Interstate and primary systems which are required to be controlled under 23 U.S.C. 131.

§ 750.503 Exemptions.

(a) The Federal Highway Administration (FHWA) may approve a State's request to exempt certain nonconforming signs, displays, and devices (hereinafter called signs) within a defined area from being acquired under the provisions of 23 U.S.C. 131 upon a showing that removal would work a substantial economic hardship throughout that area. A defined area is an area with clearly established geographical boundaries defined by the State which the State can evaluate as an economic entity. Neither the States nor FHWA shall rely on individual claims of economic hardship. Exempted signs must:

(1) Have been lawfully erected prior to May 5, 1976, and must continue to be lawfully maintained.

(2) Continue to provide the directional information to goods and services offered at the same enterprise in the defined area in the interest of the traveling public that was provided on May 5, 1976. Repair and maintenance of these signs shall conform with the State's approved maintenance standards as required by Subpart G of this part.

(b) To obtain the exemption permitted by 23 U.S.C. 131(o), the State shall establish:

(1) Its requirements for the directional content of signs to qualify the signs as directional signs to goods and services in the defined area.

(2) A method of economic analysis clearly showing that the removal of signs would work a substantial economic hardship throughout the defined area.

(c) In support of its request for exemption, the State shall submit to the FHWA:

(1) Its requirements and method (see § 750.503(b).

(2) The limits of the defined area(s) requested for exemption, a listing of signs to be exempted, their location, and the name of the enterprise advertised on May 5, 1976.

(3) The application of the requirements and method to the defined areas, demonstrating that the signs provide directional information to goods and services of interest to the traveling public in the defined area, and that removal would work a substantial economic hardship in the defined area(s).

(4) A statement that signs in the defined area(s) not meeting the exemption requirements will be removed in accordance with State law.

(5) A statement that the defined area will be reviewed and evaluated at least every three (3) years to determine if an exemption is still warranted.

(d) The FHWA, upon receipt of a State's request for exemption, shall prior to approval:

(1) Review the State's requirements and methods for compliance with the provisions of 23 U.S.C. 131 and this subpart.

(2) Review the State's request and the proposed exempted area for compliance with State requirements and methods.

(e) Nothing herein shall prohibit the State from acquiring signs in the defined area at the request of the sign owner.

(f) Nothing herein shall prohibit the State from imposing or maintaining stricter requirements.

Subpart F [Reserved]

Subpart G – Outdoor Advertising Control

Authority: 23 U.S.C. 131 and 315; 49 CFR 1.48.

Source: 40 FR 42844, Sept. 16, 1975, unless otherwise noted.

§ 750.701 Purpose.

This subpart prescribes the Federal Highway Administration (FHWA) policies and requirements relating to the effective control of outdoor advertising under 23 U.S.C. 131. The purpose of these policies and requirements is to assure that there is effective State control of outdoor advertising in areas adjacent to Interstate and Federal-aid primary highways. Nothing in this subpart shall be construed to prevent a State from establishing more stringent outdoor advertising control requirements along Interstate and Primary Systems than provided herein.

§ 750.702 Applicability.

The provisions of this subpart are applicable to all areas adjacent to the Federal-aid Interstate and Primary Systems, including toll sections thereof, except that within urban areas, these provisions apply only within 660 feet of the nearest edge of the right-of-way. These provisions apply regardless of whether

Federal funds participated in the costs of such highways. The provisions of this subpart do not apply to the Federal-aid Secondary or Urban Highway System.

§ 750.703 Definitions.

The terms as used in this subpart are defined as follows:

(a) Commercial and industrial zones are those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing, highway service or highway business (when these latter are intended for highway-oriented business), retail trade, warehouse, and similar classifications.

(b) Erect means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish.

(c) Federal-aid Primary Highway means any highway on the system designated pursuant to 23 U.S.C. 103(b).

(d) Interstate Highway means any highway on the system defined in and designated, pursuant to 23 U.S.C. 103(e).

(e) Illegal sign means one which was erected or maintained in violation of State law or local law or ordinance.

(f) Lease means an agreement, license, permit, or easement, oral or in writing, by which possession or use of land or interests therein is given for a specified purpose, and which is a valid contract under the laws of a State.

(g) Maintain means to allow to exist.

(h) Main-traveled way means the traveled way of a highway on which through traffic is carried. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(i) Sign, display or device, hereinafter referred to as "sign," means an outdoor advertising sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the Interstate or Primary Systems, whether the same be permanent or portable installation.

(j) State law means a State constitutional provision or statute, or an ordinance rule or regulation, enacted or adopted by a State.

(k) Unzoned area means an area where there is no zoning in effect. It does not include areas which have a rural zoning classification or land uses established by zoning variances or special exceptions.

(l) Unzoned commercial or industrial areas are unzoned areas actually used for commercial or industrial purposes as defined in the agreements made between the Secretary, U.S. Department of Transportation (Secretary), and each State pursuant to 23 U.S.C. 131(d).

(m) Urban area is as defined in 23 U.S.C.101(a).

(n) Visible means capable of being seen, whether or not readable, without visual aid by a person of normal visual acuity.

§ 750.704 Statutory requirements.

(a) 23 U.S.C. 131 provides that signs adjacent to the Interstate and Federal-aid Primary Systems which are visible from the main-traveled way and within 660 feet of the nearest edge of the right-of way, and those additional signs beyond 660 feet outside of urban areas which are visible from the main-traveled way and erected with the purpose of their message being read from such main-traveled way, shall be limited to the following:

(1) Directional and official signs and notices which shall conform to national standards promulgated by the Secretary in Subpart B, Part 750, Chapter I, 23 CFR, National Standards for Directional and Official Signs;

(2) Signs advertising the sale or lease of property upon which they are located;

(3) Signs advertising activities conducted on the property on which they are located;

(4) Signs within 660 feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and Federal-aid Primary Systems which are zoned industrial or commercial under the authority of State law;

(5) Signs within 660 feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and Federal-aid Primary Systems which are unzoned commercial or industrial areas, which areas are determined by agreement between the State and the Secretary; and

(6) Signs lawfully in existence on October 22, 1965, which are determined to be landmark signs.

(b) 23 U.S.C. 131(d) provides that signs in

§ 750.704(a) (4) and (5) must comply with size, lighting, and spacing requirements, to be determined by agreement between the State and the Secretary.

(c) 23 U.S.C. 131 does not permit signs to be located within zoned or unzoned commercial or industrial areas beyond 660 feet of the right-of-way adjacent to the Interstate or Federal-aid Primary System, outside of urban areas.

(d) 23 U.S.C. 131 provides that signs not permitted under § 750.704 of this regulation must be removed by the State.

§ 750.705 Effective control.

In order to provide effective control of outdoor advertising, the State must:

(a) Prohibit the erection of new signs other than those which fall under § 750.704(a) (1) through (6).

(b) Assure that signs erected under § 750.704(a) (4) and (5) comply, at a minimum, with size, lighting, and spacing criteria contained in the agreement between the Secretary and the State;

(c) Assure that signs erected under § 750.704(a) (1) comply with the national standards contained in Subpart B, Part 750, Chapter I, 23 CFR;

(d) Remove illegal signs expeditiously;

(e) Remove nonconforming signs with just compensation within the time period set by 23 U.S.C. 131 (Subpart D, Part 750, Chapter I, 23 CFR, sets forth policies for the acquisition and compensation for such signs);

(f) Assure that signs erected under § 750.704(a)(6) comply with § 750.710, Landmark Signs, if landmark signs are allowed:

(g) Establish criteria for determining which signs have been erected with the purpose of their message being read from the main-traveled way of an Interstate or primary highway, except where State law makes such criteria unnecessary. Where a sign is erected with the purpose of its message being read from two or more highways, one or more of which is a controlled highway, the more stringent of applicable control requirements will apply;

(h) Develop laws, regulations, and procedures to accomplish the requirements of this subpart;

(i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence and cause their prompt removal; and

(j) Submit regulations and enforcement procedures to FHWA for approval.[40 FR 42844, Sept. 16, 1975; 40 FR 49777, Oct. 24, 1975]

§ 750.706 Sign control in zoned and unzoned commercial and industrial areas.

The following requirements apply to signs located in zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the right-of-way adjacent to the Interstate and Federal-aid primary highways.

(a) The State by law or regulation shall, in conformity with its agreement with the Secretary, set criteria for size, lighting, and spacing of outdoor advertising signs located in commercial or industrial zoned or unzoned areas, as defined in the agreement, adjacent to Interstate and Federal-aid primary highways. If the agreement between the Secretary and the State includes a grandfather clause, the criteria for size, lighting, and spacing will govern only those signs erected

subsequent to the date specified in the agreement. The States may adopt more restrictive criteria than are presently contained in agreements with the Secretary.

(b) Agreement criteria which permit multiple sign structures to be considered as one sign for spacing purposes must limit multiple sign structures to signs which are physically contiguous, or connected by the same structure or cross-bracing, or located not more than 15 feet apart at their nearest point in the case of back-to-back or "V" type signs.

(c) Where the agreement and State law permits control by local zoning authorities, these controls may govern in lieu of the size, lighting, and spacing controls set forth in the agreement, subject to the following:

(1) The local zoning authority's controls must include the regulation of size, of lighting and spacing of outdoor advertising signs, in all commercial and industrial zones.

(2) The regulations established by the local zoning authority may be either more restrictive or less restrictive than the criteria contained in the agreement, unless State law or regulations require equivalent or more restrictive local controls.

(3) If the zoning authority has been delegated, extraterritorial, jurisdiction under State law, and exercises control of outdoor advertising in commercial and industrial zones within this extraterritorial jurisdiction, control by the zoning authority may be accepted in lieu of agreement controls in such areas.

(4) The State shall notify the FHWA in writing of those zoning jurisdictions wherein local control applies. It will not be necessary to furnish a copy of the zoning ordinance. The State shall periodically assure itself that the size, lighting, and spacing control provi-

sions of zoning ordinances accepted under this section are actually being enforced by the local authorities.

(5) Nothing contained herein shall relieve the State of the responsibility of limiting signs within controlled areas to commercial and industrial areas.

§ 750.707 Nonconforming signs.

(a) *General.* The provisions of § 750.707 apply to nonconforming signs which must be removed under State laws and regulations implementing 23 U.S.C. 131. These provisions also apply to nonconforming signs located in commercial and industrial areas within 660 feet of the nearest edge of the right-of-way which come under the so-called grandfather clause contained in State-Federal agreements. These provisions do not apply to conforming signs regardless of when or where they are erected.

(b) *Nonconforming Signs.* A nonconforming sign is a sign which was lawfully erected but does not comply with the provisions of State law or State regulations passed at a later date or later fails to comply with State law or State regulations due to changed conditions. Changed conditions include, for example, signs lawfully in existence in commercial areas which at a later date become non-commercial, or signs lawfully erected on a secondary highway.

(c) *Grandfather Clause.* At the option of the State, the agreement may contain a grandfather clause under which criteria relative to size, lighting, and spacing of signs in zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the right-of-way apply only to new signs to be erected after the date specified in the agreement. Any sign lawfully in existence in a commercial or industrial area on such date may remain even though it may not comply with the size, lighting, or spacing criteria. This clause only

allows an individual sign at its particular location for the duration of its normal life subject to customary maintenance. Preexisting signs covered by a grandfather clause, which do not comply with the agreement criteria have the status of nonconforming signs.

(d) *Maintenance and Continuance.* In order to maintain and continue a nonconforming sign, the following conditions apply:

(1) The sign must have been actually in existence at the time the applicable State law or regulation became effective as distinguished from a contemplated use such as a lease or agreement with the property owner. There are two exceptions to actual existence as follows:

(i) Where a permit or similar specific State governmental action was granted for the construction of a sign prior to the effective date of the State law or regulations and the sign owner acted in good faith and expended sums in reliance thereon. This exception shall not apply in instances where large numbers of permits were applied for and issued to a single sign owner, obviously in anticipation of the passage of a State control law.

(ii) Where the State outdoor advertising control law or the Federal-State agreement provides that signs in commercial and industrial areas may be erected within six (6) months after the effective date of the law or agreement provided a lease dated prior to such effective date was filed with the State and recorded within thirty (30) days following such effective date.

(2) There must be existing property rights in the sign affected by the State law or regulations. For example, paper signs nailed to trees, abandoned signs and the like are not protected.

(3) The sign may be sold, leased, or otherwise transferred without affecting its status, but its location may not be changed. A nonconforming sign removed as a result of a right-of-way taking or for any other reason may be relocated to a conforming area but cannot be re-established at a new location as a nonconforming use.

(4) The sign must have been lawful on the effective date of the State law or regulations, and must continue to be lawfully maintained.

(5) The sign must remain substantially the same as it was on the effective date of the State law or regulations. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Each State shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights.

(6) The sign may continue as long as it is not destroyed, abandoned, or discontinued. If permitted by State law and reerected in kind, exception may be made for signs destroyed due to vandalism and other criminal or tortious acts.

(i) Each state shall develop criteria to define destruction, abandonment and discontinuance. These criteria may provide that a sign which for a designated period of time has obsolete advertising matter or is without advertising matter or is in need of substantial repair may constitute abandonment or discontinuance. Similarly, a sign damaged in excess of a certain percentage of its replacement cost may be considered destroyed.

(ii) Where an existing nonconforming sign ceases to display advertising matter, a reasonable period of time

to replace advertising content must be established by each State. Where a new content is not put on a structure within the established period, the use of the structure as a nonconforming outdoor advertising sign is terminated and shall constitute an abandonment or discontinuance. Where a State establishes a period of more than one (1) year as a reasonable period for change of message, it shall justify that period as a customary enforcement practice within the State. This established period may be waived for an involuntary discontinuance such as the closing of a highway for repair in front of the sign.

(e) *Just Compensation.* The States are required to pay just compensation for the removal of nonconforming lawfully existing signs in accordance with the terms of 23 U.S.C. 131 and the provisions of Subpart D, Part 750, Chapter I, 23 CFR. The conditions which establish a right to maintain a nonconforming sign and therefore the right to compensation must pertain at the time it is acquired or removed.

§ 750.708 Acceptance of state zoning.

(a) 23 U.S.C. 131(d) provides that signs "may be erected and maintained within 660 feet of the nearest edge of the right-of-way within areas . . . which are zoned industrial or commercial under authority of State law." Section 131(d) further provides. "The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act."

(b) State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is

created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.

(c) Where a unit of government has not zoned in accordance with statutory authority or is not authorized to zone, the definition of an unzoned commercial or industrial area in the State-Federal agreement will apply within that political subdivision or area.

(d) A zone in which limited commercial or industrial activities are permitted as an incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes.

§ 750.709 On-property or on-premise advertising.

(a) A sign which consists solely of the name of the establishment or which identifies the establishment's principal or accessory products or services offered on the property is an on-property sign.

(b) When a sign consists principally of brand name or trade name advertising and the product or service advertised is only incidental to the principal activity, or if it brings rental income to the property owner, it shall be considered the business of outdoor advertising and not an on-property sign.

(c) A sale or lease sign which also advertises any product or service not conducted upon and unrelated to the business or selling or leasing the land on which the sign is located is not an on-property sign.

(d) Signs are exempt from control under 23 U.S.C. 131 if they solely advertise the sale or lease of property on which they are located or advertised activities conducted on the property on which they are located. These signs are subject to regulation (Subpart A, Part 750, Chapter I, 23 CFR) in those States which have exe-

cuted a bonus agreement, 23 U.S.C. 131(j). State laws or regulations shall contain criteria for determining exemptions. These criteria may include:

(1) A property test for determining whether a sign is located on the same property as the activity or property advertised; and

(2) A purpose test for determining whether a sign has as its sole purpose the identification of the activity located on the property or its products or services, or the sale or lease of the property on which the sign is located.

(3) The criteria must be sufficiently specific to curb attempts to improperly qualify outdoor advertising as "on-property" signs, such as signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent 23 U.S.C. 131.

§ 750.710 Landmark signs.

(a) 23 U.S.C. 131(c) permits the existence of signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance, the preservation of which is consistent with the purpose of 23 U.S.C. 131.

(b) States electing to permit landmark signs under 23 U.S.C. 131(c) shall submit a one-time list to the Federal Highway Administration for approval. The list should identify each sign as being in the original 1966 inventory. In the event a sign was omitted in the 1966 inventory, the State may submit other evidence to support a determination that the sign was in existence on October 22, 1965.

(c) Reasonable maintenance, repair, and restoration of a landmark sign is permitted. Substantial change in

size, lighting, or message content will terminate its exempt status.

§ 750.711. Structures which have never displayed advertising material.

Structures, including poles, which have never displayed advertising or informative content are subject to control or removal when advertising content visible from the main-traveled way is added or affixed. When this is done, an "outdoor advertising sign" has then been erected which must comply with the State law in effect on that date.

§ 750.712 Reclassification of signs.

Any sign lawfully erected after the effective date of a State outdoor advertising control law which is reclassified from legal-conforming to nonconforming and subject to removal under revised State statutes or regulations and policy pursuant to this regulation is eligible for Federal participation in just compensation payments and other eligible costs.

§ 750.713 Bonus provisions.

23 U.S.C. 131(j) specifically provides that any State which had entered into a bonus agreement before June 30, 1965, will be entitled to remain eligible to receive bonus payments provided it continues to carry out its bonus agreement. Bonus States are not exempt from the other provisions of 23 U.S.C. 131. If a State elects to comply with both programs, it must extend controls to the Primary System, and continue to carry out its bonus agreement along the Interstate System except where 23 U.S.C. 131, as amended, imposes more stringent requirements.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF SOUTH DAKOTA, PETITIONER

v.

ANDREW L. LEWIS, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Cases:

Brown v. *EPA*, 521 F. 2d 827, vacated, 431 U.S. 99, on remand, 566 F. 2d 665 5

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District of Columbia v. *Train*, 521 F. 2d 971, vacated, 431 U.S. 99 5

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Steward Machine Co. v. *Davis*, 301 U.S. 548 ..... 4, 5, 6

Texas Landowners Rights Ass'n v. *Harris*, 453 F. Supp. 1025, aff'd, 598 F. 2d 311 (table) cert. denied, 444 U.S. 927 ..... 5, 6

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In this action, petitioner State of South Dakota contends that the Highway Beautification Act of 1965 (23 U.S.C. 131) violates the "Necessary and Proper" Clause of the Constitution (Article I, Section 8, Clause 18) and the Tenth Amendment. The Act establishes, as a condition of receipt of certain federal highway funds, that states "ma[k]e provision for effective control" of outdoor advertising adjacent to the interstate and federal-aid primary highway systems. 23 U.S.C. 131(b). If the Secretary of Transportation determines that a state has not provided for "effective control" as defined in 23 U.S.C. 131(c), the state's apportionment of federal-aid highway funds will be reduced by 10%. 23 U.S.C. 131(b).

1. In 1977, following several years of litigation and negotiation, the Secretary preliminarily determined that petitioner had not provided for "effective control" of billboards. Petitioner challenged this decision and requested an administrative hearing. At the end of the administrative proceedings, the Secretary in November 1978 concluded that petitioner had not complied with the Act, and he ordered that 10% of petitioner's apportionment of federal-aid highway funds for fiscal year 1978 (approximately $4 million) be reapportioned to other states (Pet. App. iii-v).

In December 1977, while the administrative proceeding was pending, petitioner commenced this action in the United States District Court for the District of South Dakota to challenge the constitutionality of the Highway Beautification Act.[1] Thereafter, petitioner filed suit under the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) to contest the Secretary's reapportionment decision. These cases were consolidated by the district court (Pet. 4; Pet. App. ii, iv-v).

On cross-motions for summary judgment, the district court rejected petitioner's various attacks on the constitutionality of the Highway Beautification Act (Pet. App. vi-xx). The district court also found ample evidence in the administrative record to support the Secretary's determination that petitioner had not provided effective control of outdoor advertising (*id.* at xxiv-lv).[2] Accordingly, the court

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[1]Petitioner also brought a separate action disputing the Secretary's reservation of the funds in question pending resolution of the outstanding issues. Both the district court and the court of appeals sustained the Secretary's position (Pet. App. iv, lxi). See *South Dakota* v. *Adams*, 587 F. 2d 915 (8th Cir. 1978), cert. denied, 441 U.S. 961 (1979).

[2]In addition, and notwithstanding petitioner's references to the opinion of the hearing examiner (Pet. 4, 10), the district court expressly found that petitioner "ha[d] exhibited some reluctance to comply with the provisions of the Highway Beautification Act" (Pet. App. iii) and that its "action [did] not comport with a 'good faith attempt' to comply" (*id.* at lii). See also *id.* at iii-iv, xvi, lii, lxi.

entered judgment for respondents in both cases (*id.* at xxi-xxii, lvii-lviii).

On petitioner's appeal, the court of appeals, having "carefully studied the record in these cases," concluded that there was "no merit to [petitioner's] arguments" and affirmed "on the basis of [the district court's] detailed and well reasoned opinions * * *" (Pet. App. lxii). The court of appeals subsequently denied rehearing (*id.* at lxv).

2. Petitioner seeks review of the lower courts' holdings that the Highway Beautification Act does not violate the "Necessary and Proper" Clause of the Constitution or the Tenth Amendment.[3] However, the decision below is correct and is not in conflict with any decisions of this Court or the other courts of appeals. Further review is therefore unwarranted.[4]

The Highway Beautification Act was designed to control "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system * * * in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). As the district court correctly concluded (Pet. App. lx-xi, xiv) and as petitioner has conceded (8/20/79 Tr. 31, 35), these are legitimate national objectives that are well within the constitutional authority of Congress.

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[3]As respondents pointed out in the court of appeals (Br. 17-18), petitioner did not raise the issue of the "Necessary and Proper" Clause in the district court, and therefore it was not properly presented for appellate review.

[4]We note that petitioner subsequently instituted effective control of billboards and is in compliance with the Act. Hence, only funds for fiscal year 1978 are at stake here (Pet. App. v-vi, xi n.4, lxii).

Moreover, the means employed in the Act to achieve these legislative ends are reasonable and appropriate. Like innumerable other statutes, the Act conditions the receipt of federal funds—here, 10% of a state's apportionment of federal-aid highway funds—upon the state's compliance with federal standards that serve to ensure that the expenditure of these funds is consistent with congressional policy. Congress has the "power to fix the terms upon which its money allotments to states shall be disbursed," and "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143, 144 (1947). Especially since "the construction of these highways is financed almost entirely by federal funds" (Pet. App. x), the conditions imposed by the Act upon the receipt of federal funds are unquestionably a "necessary and proper" incident to Congress' spending power.[5]

This Court and the lower federal courts have consistently upheld the constitutional validity of using conditional grant programs to induce cooperation by the states with federal policies. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, *supra*, 330 U.S. at 142-144; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-598 (1937); *State of North Carolina* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978); *Florida Dep't of Health* v. *Califano*, 449 F. Supp. 274, 283-285 (N.D. Fla. 1978), aff'd per curiam, 585 F. 2d 150 (5th Cir.), cert. denied, 441 U.S. 931

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[5] It is, of course, for Congress to determine whether federal outlays are in the general welfare and to select the appropriate means to effectuate its policy choices. See *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976); *Legal Tender Case*, 110 U.S. 421, 440-441 (1884); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 412-414, 419, 421, 423 (1819).

(1979); *State of Nebraska, Dep't of Roads* v. *Tiemann*, 510 F. 2d 446, 448 (8th Cir. 1975); *City of New York* v. *Richardson*, 473 F. 2d 923, 928 (2d Cir.), cert. denied, 412 U.S. 950 (1973); *Texas Landowners Rights Ass'n* v. *Harris*, 453 F. Supp. 1025, 1028-1031 (D.D.C. 1978), aff'd, 598 F. 2d 311 (D.C. Cir.) (table), cert. denied, 444 U.S. 927 (1979). See also *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion); cf. *Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65, 88, 95, 97-104 (1976). These decisions have repeatedly rejected the arguments raised by petitioner in this case that conditional federal grants exceed the proper province of Congress and contravene the Tenth Amendment because the conditions are "a form of coercion or compulsion" (*City of New York* v. *Richardson, supra*, 473 F. 2d at 928).[6] Although "the carrot provided by the federal government in the form of financial aid has proven, in many instances, too tempting to resist" (*ibid.*), the Constitution does not deem "motive or temptation" to be "equivalent to coercion" (*Steward Machine Co.* v. *Davis, supra*, 301 U.S. at 589-590).[7]

Nothing in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), suggests a contrary result in this case. There, the 1974 amendments to the Fair Labor Standards Act (29

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[6]The district court also stated that it was "not convinced that the conditional grant in this case is coercive" (Pet. App. xvi).

[7]The discussion of conditional grants in *United States* v. *Butler*, 297 U.S. 1 (1936), upon which petitioner relies, is of doubtful validity in light of the foregoing decisions of this Court, and in any event is distinguishable from the present case for the reasons stated by the district court (Pet. App. xii-xiii) and by this Court in *Steward Machine Co.* v. *Davis, supra*, 301 U.S. at 592-593. Petitioner also erroneously relies on *Brown* v. *EPA*, 521 F. 2d 827 (9th Cir. 1975), vacated, 431 U.S. 99 (1977), on remand, 566 F. 2d 665 (9th Cir. 1977), and *District of Columbia* v. *Train*, 521 F. 2d 971 (D.C. Cir. 1975), vacated, 431 U.S. 99 (1977). In both cases, the courts of appeals specifically recognized the authority of Congress to condition federal grants upon a state's conformity to federal standards. See 521 F. 2d at 840; 521 F. 2d at 992-993 & n.26.

U.S.C. 201 *et seq.*) were struck down because they "regulate[d] directly the activities of States" (426 U.S. at 841) and, by "speaking directly to the States *qua* States, require[d] that they [observe provisions regarding minimum wages and maximum hours for their employees]" (*id.* at 847). Thus, the invalidity in the statute was that it "would forbid * * * [certain employment] choices by the States" (*id.* at 848) and would "force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made" (*id.* at 855). In contrast, the Highway Beautification Act does not require or forbid any decisions by a state in setting its policies. Rather, the Act merely establishes conditions upon the receipt of federal funds that Congress has appropriated in furtherance of the general welfare. "There is only a condition which the state is free at pleasure to disregard or to fulfill" (*Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 595), and a state may "adopt[] the 'simple expedient' of not yielding to what [it] urges is federal coercion" (*Oklahoma* v. *Civil Service Comm'n, supra,* 330 U.S. at 143-144). See also Pet. App. xi n.4, xv-xvi; *State of North Carolina* v. *Califano, supra,* 445 F. Supp. at 536 n.10; *Florida Dep't of Health* v. *Califano, supra,* 449 F. Supp. at 284; *Texas Landowners Rights Ass'n* v. *Harris, supra,* 453 F. Supp. at 1030. As the Court has noted elsewhere, "[t]here is a basic difference between direct * * * [governmental] interference * * * and * * * encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the * * * [government] attempts to impose its will by force of law; the * * * [government's] power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher* v. *Roe,* 432 U.S. 464, 475-476 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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ALEXANDER L. STEVAS,
CLERK

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REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The Petitioner received the Memorandum for the Respondents in *Opposition to the Petition for Certiorari* in the above matter on April 22, 1981.

Petitioner takes this opportunity for a very brief reply memorandum.

Respondents on page 4 of their Memorandum state

that this court and the lower federal courts have consistently upheld the constitutional validity of using conditional grant programs to *"induce"* cooperation by the states with federal policies. Numerous cases are cited by Respondents on pages 4 and 5 of their Memorandum to support that statement.

Respondents, however, admit on page 5 following the citations that all of their cited decisions relate to arguments under the Tenth Amendment.

None of those authorities relate to or touch upon the Petitioner's argument under the Necessary and Proper Clause.

Petitioner's Necessary and Proper Clause argument is unique and has never been before this court or any lower federal court to Petitioner's knowledge and belief.

Petitioner argued that 23 USC 131 was coercive in the lower court, and effectively made and preserved both its Necessary and Proper Clause and Tenth Amendment arguments by its original pleadings and otherwise.

The very nature of Petitioner's case in the lower federal court was a constitutional challenge to 23 USC 131 both facially and as it applies to the State of South Dakota.

The *facts* of this case are readily distinguishable from the factual setting of each and every of the cases relied upon by Respondents.

The very purpose of the appeal system is to allow parties to refine and clarify their arguments and authorities. Petitioner has not brought the matter of the consti-

tutionality of 23 USC 131 into consideration for the first time on appeal. Rather, the constitutionality of this statute has at all times been in issue in these proceedings.

The Respondents' Eighth Circuit Court of Appeals brief acknowledges the uniqueness of Petitioner's arguments.

The *threshold issue* of this case is whether the *facts* constitute *"duress"* or *"inducement"*. Whether given *facts* constitute *duress* is a question of law for the court. *McKenzie-Hague Co. v. Carbide Corp.*, 73 F2nd 78 (CCA8); Williston on Contracts, 3rd Ed., Vol. XIII Ch. 47.

As this court itself states in *Steward Machine Co. v. Davis* 301 U.S. 548 (1937);

> "To draw the line intelligently between *duress* and *inducement* there is need to remind ourselves of facts . . . that are now matters of common knowledge
>
> "***
>
> "In the presence of this urgent need (of unemployment created by the depression) for some remedial expedient, the question is to be answered whether the expedient adopted (by Congress) has overleapt the bounds of power." (81 L.Ed. 1290-1291) (Parenthetical material and emphasis added)

Respondents imply in footnote 6 at page 5 of their Memorandum that the district court indicated it was not convinced that the conditional grant in this case was coercive. However, the district court did find that the State of South Dakota would *not* have adopted its compliance

statute but for the coercive effect of 23 USC 131. (Petition-appendix A, page xii) In any event, whether 23 USC 131 constitutes "duress" or "inducement" *is a matter of law for this court.*

The power of Congress to *"condition"* its funds is not unlimited. This court pointed that out in *United States v. Butler*, 297 U.S. 1 (1936), as noted at page 17 of this party's Petition.

Butler is readily distinguishable from *Steward* in numerous ways as extensively done by this court, itself, in the *Steward* decision. (81 L.Ed. 1294 et seq) It is carefully stated in *Steward* that the condition before it was not coupled with a coercive contract oppressive in its consequence; the condition was not linked to an irrevocable agreement because the state at its pleasure was free to repeal its unemployment law; the condition was not directed to the attainment of an unlawful end beyond the power of Congress; and, the federal statute did not call for a surrender by the states of powers essential to their quasi-sovereign existence. The Federal Highway Beautification Act, 23 USC 131, violates each of these distinctions.

Respondents' reliance on *Steward* and subsequent authority is misplaced.

Steward was an action brought by a private party, not a state. It construed a federal statute which provided a credit to private employers for contributions made to state unemployment compensation programs. The federal statute merely encouraged the states to adopt statutory programs to alleviate the fiscal drain on the federal treasury caused by the Great Depression. There was ab-

solutely no penalty imposed upon the state if it chose not to act.

The federal statute before this court in *Steward* was an *'emergency measure necessitated by the economic crisis of the great depression.'*

The factual situation of *Steward* is akin to that of *Fry v. United States*, 421 U.S. 542 (1975), as revitalized by this court in the Tenth Amendment case of *National League of Cities v. Usery*, 426 U.S. 833 (1976). This court recognizes in *Fry* as emphasized in *Usery* that the federal statute being construed in *Fry* was *"An emergency measure to counter severe inflation that threatened the national economy."* (421 U.S. at 548, and 426 U.S. at 439, respectively)

The net result of *Steward* and *Fry* appears to be that in times of dire *national emergency* the Tenth Amendment must give way to the national interest to some degree or another. Thus, this court in *Usery* appears to have established some sort of national emergency exception to the Tenth Amendment.

The Highway Beautification Act, 23 USC 131, requires that the states regulate outdoor advertising on private property and penalizes a state 10% of its federal highway funds if it fails to act. Respondents urge that this 10% penalty is merely a conditional inducement. The fact that the so-called inducement is an arbitrary percentage reduction of the federal funds is evidence in and of itself that the federal law is coercive by design. There is absolutely no interrelationship between the penalty and the program or program funds being reduced.

The state under 23 USC 131 *must* enter into *"agree-*

ments" with the federal government, and guarantee that the state regulation of outdoor advertising complies with the federal statute, extensive federal rules regulating even the most minute aspects of compliance, and utilizes state personnel, money and courts for enforcement of the federal regulatory scheme. The record is clear that the state statute and regulatory scheme must suit the liking of the federal bureaucracy without exception. The state has no discretion.

It is a matter of common sense that outdoor advertising does not pose any threat to the national economy, nor does its regulation alleviate any national fiscal crisis or other emergency situation.

This court in *Steward* clearly points out that its ruling leaves many questions open. (81 L.Ed. 1293)

This court declares that it is constitutionally improper to condition a federal statute upon the conduct of a state, where the conduct to be stimulated or discouraged is unrelated to the federal fiscal need, or any other legitimate national power. (Ibid)

The conduct to be stimulated by the Federal Highway Beautification Act is totally unrelated to any federal fiscal need and is beyond any national power. The penalty bears no relationship to any federal tax or the expenditure of federal funds for highway construction. The penalty is a "weapon of coercion impairing the autonomy of the state." The penalty constitutes *duress* not *inducement*. The penalty overleaps the bounds of national power.

The penalty constitutes the exertion of a power akin to undue influence.

The very purpose of the penalty is to create undue influence upon the will of the state concerning the contractual agreements which are to be entered into under the federal statute by and between the federal government and the state.

The Federal Highway Beautification Act couples the penalty with a coercive contract oppressive in its consequences. The condition is linked to the states being required to have irrevocable agreements prepared to suit the pleasure of the federal bureaucracy and the state is not free to repeal its state compliance acts or modify its regulatory program without the prior approval and imprimatur of the federal Department of Transportation. *Doing so results in the penalty.*

The condition is not directed to the attainment of a lawful national power. There is no power vested in Congress to control private property uses at least lacking any national emergency, or over-riding interest.

The Highway Beautification statute calls for a surrender by the states of powers essential to their quasi-sovereign existence, namely the states' police and eminent domain powers.

There is no range of judgment given to the states as to the particular type of statute to be spread upon its books. This too violates *Steward.* (81 L.Ed. 1294)

The threat of such a substantial penalty is an imposition on the will of the state, and constitutes duress or undue influence under any standard legal authority.

Petitioner asserts that the *factual setting* of this case results in an excessive intrusion upon reserved state

powers in violation of the Tenth Amendment, and not within the so-called national emergency exception established by *Steward*, *Fry*, and *Usery*.

Further, the facts of this case establish per se "duress" for purposes of *Steward*, and based upon the further argument propounded by Petitioner under the Necessary and Proper Clause.

IT IS THEREFORE, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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